MANUAL OF

MODEL CIVIL

JURY INSTRUCTIONS

FOR THE

DISTRICT COURTS

OF THE EIGHTH CIRCUIT

(2012)

CITE THIS WORK

8TH CIR. CIVIL JURY INSTR. § 4.50A (2012)

or

8TH CIR. CIVIL JURY INSTR. § 4.50A comment (2012)

DEDICATION

The Committee is honored to dedicate these instructions to the Honorable Scott O. Wright, one of the founding fathers of the Judicial Committee on Model Jury Instructions for the Eighth Circuit. He served as Chairman of the Committee from its creation in 1983 and guided the Committee until 2009. His belief that jury trials are essential to our liberty, and his dedication to giving juries written instructions in language that could be understood by the average juror have guided the Committee from its beginning. The leadership and encouragement of Scott Wright are largely responsible for the creation of the Committee and its continued existence.

It is a great privilege for the Committee to recognize Scott's leadership on the Committee and dedicate these Instructions in recognition of his outstanding contributions.

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INTRODUCTION

These model instructions have been prepared to help judges communicate more effectively with juries. The Manual is meant to provide judges and lawyers with models of clear, brief and simple instructions calculated to maximize juror comprehension. They are not intended to be treated as the only method of instructing properly a jury. *See United States v. Ridinger*, 805 F.2d 818, 821 (8th Cir. 1986). "The Model Instructions, . . . are not binding on the district courts of this circuit, but are merely helpful suggestions to assist the district courts." *United States v. Norton*, 846 F.2d 521, 525 (8th Cir. 1988).

Every effort has been made to assure conformity with current Eighth Circuit law; however, it cannot be assumed that all of these model instructions in the form given necessarily will be appropriate under the facts of a particular case. The Manual covers issues on which instructions are most frequently given, but because each case turns on unique facts, instructions should be drafted or adapted to conform to the facts in each case. These instructions, proposed instructions, and instructions approved but not yet published in paper format may be found on the Internet in both WordPerfect, Word, and pdf formats at http://www.juryinstructions.ca8.uscourts.gov/

In drafting instructions, the Committee has attempted to use simple language, short sentences, and the active voice and omit unnecessary words. We have tried to use plain language because giving the jury the statutory language, or language from appellate court decisions, is often confusing.

It is our position that instructions should be as brief as possible and limited to what the jury needs to know for the case. We also recommend sending a copy of the instructions as given to the jury room.

Counsel are reminded of Civil Rule 51(c), which requires a specific objection, on the record, before the jury is instructed if possible, and (d), which requires a proper, timely objection if instruction error is to be preserved for appeal, unless it amounts to plain error.

The Committee expresses its appreciation to all members of the subcommittee, whose diligent research and commitment to this project are essential in continuing to revise current instructions and draft new ones. Special thanks must go to Suzy Flippen, Judicial Assistant to the Honorable Beth M. Deere, who has typed, retyped, corrected, edited and revised the drafts on numerous occasions. Her dedication to detail, careful screening of drafts, and comparison of various drafts have been essential in the production of these instructions.

HOW TO USE THESE INSTRUCTIONS

These civil jury instructions have been arranged with an awareness that judges follow different practices when it comes to jury instructions. Some judges send a full set of written instructions into the jury room after they have been read in open court. Other judges also provide jurors with written copies of the instructions to follow as they are read from the bench. Still other judges prefer not to provide the jury with any written instructions. These civil jury instructions have been arranged and drafted to accommodate any of these varying practices.

Model Instruction 1.01 is a general instruction which is intended to give jurors an overview of their duties and trial procedures during the trial. It should be given at the commencement of the trial (after the jurors are sworn and before opening statements). Model Instruction 1.01 incorporates matters which are also addressed in Model Instructions 3.02 (Judge's Opinion) and 3.03 (Credibility of Witnesses). The Committee recommends that the general instructions which are given at the outset of the trial (Model Instructions 1.01 - 1.06) and those given during the middle of trial should not be repeated at the time the case is submitted to the jury. Those general matters which are necessary to the jury's final deliberations are again repeated in Model Instructions 2.01 - 2.11, and 3.01 - 3.07.

The Committee recognizes that varying burden-of-proof formulations are used in different jurisdictions. Judges and lawyers often are accustomed to using the burden-of-proof instruction found in the pattern civil jury instructions adopted by their particular states. Model Instruction 3.04 is a burden-of-proof instruction which is intended to accommodate the various formulations. However, the Committee recognizes that a judge may prefer to use the burden-of-proof formulation which is accepted in his or her state. If such a burden-of-proof instruction is used, the element/issue instructions must be modified accordingly.

The Committee recommends that written instructions which are to be sent into the jury room should be numbered, in the order given, or accurately titled without numbering. If a "titling" method is used, the judge should be aware that the titles used in these instructions were not designed for such use and that an appropriately "neutral" method of expression should be used. Such instructions should also be free of any extraneous notations: for example, the model instruction number, the identity of the submitting party, committee notes, any notes by the court, and other such notations, should not appear on the written instructions given to the jury.

These instructions may be found on the Internet in both WordPerfect, Word, and pdf formats at http://www.juryinstructions.ca8.uscourts.gov/

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These preliminary instructions should be read to the jury at the commencement of trial. They need not be submitted in written form even if other instructions are given in written form at the time the case is submitted to the jury.

(Instruction No. 0.01 should be read to the jury panel before voir dire and Instruction No. 0.02 should be read at the end of voir dire.)

Preliminary Instructions for Use at Commencement of Trial

0.01 INSTRUCTIONS BEFORE VOIR DIRE

Members of the Jury Panel, if you have a cell phone, PDA, Blackberry, smart phone, iPhone and any other wireless communication device with you, please take it out now and turn it off. Do not turn it to vibration or silent; power it down. [During jury selection, you must leave it off.] (Pause for thirty seconds to allow them to comply, then tell them the following:)

If you are selected as a juror, (briefly advise jurors of your court's rules concerning cellphones, cameras and any recording devices).

I understand you may want to tell your family, close friends, and other people about your participation in this trial so that you can explain when you are required to be in court, and you should warn them not to ask you about this case, tell you anything they know or think they know about it, or discuss this case in your presence. You must not post any information on a social network, or communicate with anyone, about the parties, witnesses, participants, [claims] [charges], evidence, or anything else related to this case, or tell anyone anything about the jury's deliberations in this case until after I accept your verdict or until I give you specific permission to do so. If you discuss the case with someone other than the other jurors during deliberations, you may be influenced in your verdict by their opinions. That would not be fair to the parties and it would result in a verdict that is not based on the evidence and the law.

While you are in the courthouse and until you are discharged in this case, do not provide any information to anyone by any means about this case. Thus, for example, do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, camera, recording device, Blackberry, PDA, computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or Website such as Facebook, MySpace, YouTube, or Twitter, or in any other way communicate to anyone any information about this case until I accept your verdict or until you have been excused as a juror.

Do not do any research -- on the Internet, in libraries, in the newspapers, or in any other way -- or make any investigation about this case on your own. Do not visit or view any place discussed in this case and do not use Internet programs or other device to search for or to view any place discussed in the testimony. Also, do not research any information about this case, the

law, or the people involved, including the parties, the witnesses, the lawyers, or the judge until you have been excused as jurors.

The parties have a right to have this case decided only on evidence they know about and that has been presented here in court. If you do some research or investigation or experiment that we don't know about, then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process, including the oath to tell the truth and by cross-examination. Each of the parties is entitled to a fair trial, rendered by an impartial jury, and you must conduct yourself so as to maintain the integrity of the trial process. If you decide a case based on information not presented in court, you will have denied the parties a fair trial in accordance with the rules of this country and you will have done an injustice. It is very important that you abide by these rules. Failure to follow these instructions could result in the case having to be retried.

[Are there any of you who cannot or will not abide by these rules concerning communication with others during this trial?] [Failure to follow these rules can result in you being held in contempt.] (And then continue with other voir dire.)

Preliminary Instructions for Use at Commencement of Trial

0.02 INSTRUCTIONS AT END OF VOIR DIRE

During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends. Do not allow anyone to discuss the case with you or within your hearing. "Do not discuss" also means do not e-mail, send text messages, blog or engage in any other form of written, oral or electronic communication, as I instructed you before.

Do not read any newspaper or other written account, watch any televised account, or listen to any radio program on the subject of this trial. Do not conduct any Internet research or consult with any other sources about this case, the people involved in the case, or its general subject matter. You must keep your mind open and free of outside information. Only in this way will you be able to decide the case fairly based solely on the evidence and my instructions on the law. If you decide this case on anything else, you will have done an injustice. It is very important that you follow these instructions.

I may not repeat these things to you before every recess, but keep them in mind until you are discharged.

Preliminary Instructions for Use at Commencement of Trial

1.01 GENERAL: NATURE OF CASE; BURDEN OF PROOF; DUTY OF JURY; CAUTIONARY

Ladies and Gentlemen: I am now going to give you some instructions about this case and about your duties as jurors. At the end of the trial I will give you more instructions. I may also give you instructions during the trial. All instructions - those I give you now and those I give you later - [whether they are in writing or given to you orally] – are equally important and you must follow them all.

[Describe your court's policy, such as "You must leave your cell phone, PDA, smart phone, iPhone, tablet computer, and any other wireless communication devices] in the jury room during the trial and may only use them during breaks. However, you are not allowed to have those devices in the jury room during your deliberations. You may give them to the [bailiff] [deputy clerk] [court security officer] for safekeeping just before you start to deliberate. They will be returned to you when your deliberations are complete."]

[This is a civil case brought by the plaintiff[s] against the defendant[s]. [Describe the parties' claims and defenses; counterclaims and defenses to the counterclaims.] It will be your duty to decide from the evidence [which party is entitled to your verdict[s]] [whether the plaintiff[s] is [are] entitled to a verdict against the defendant[s].]

Your duty is to decide what the facts are from the evidence. You are allowed to consider the evidence in the light of your own observations and experiences. After you have decided what the facts are, you will have to apply those facts to the law, which I give you in these and in my other instructions. That is how you will reach your verdict. Only you will decide what the facts are. However, you must follow my instructions, whether you agree with them or not. You have taken an oath to follow the law that I give you in my instructions.

Preliminary Instructions for Use at Commencement of Trial

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness says, or only part of it, or none of it.

In deciding what testimony to believe, consider the witnesses' intelligence, their opportunity to have seen or heard the things they testify about, their memories, any reasons they might have to testify a certain way, how they act while testifying, whether they said something different at another time, whether their testimony is generally reasonable, and how consistent their testimony is with other evidence that you believe.

Do not let sympathy, or your own likes or dislikes, influence you. The law requires you to come to a just verdict based only on the evidence, your common sense, and the law that I give you in my instructions, and nothing else.

Nothing I say or do during this trial is meant to suggest what [I think of the evidence or] I think your verdict should be.

1.02 EVIDENCE; LIMITATIONS

When I use the word "evidence," I mean the testimony of witnesses; documents and other things I receive as exhibits; facts that I tell you the parties have agreed are true; and any other facts that I tell you to accept as true.

Some things are not evidence. I will tell you now what is not evidence:

1. Lawyers' statements, arguments, questions, and comments are not evidence.

2. Documents or other things that might be in court or talked about, but that I do not receive as exhibits, are not evidence.

3. Objections are not evidence. Lawyers have a right – and sometimes a duty – to object when they believe something should not be a part of the trial. Do not be influenced one way or the other by objections. If I sustain a lawyer's objection to a question or an exhibit, that means the law does not allow you to consider that information. When that happens, you have to ignore the question or the exhibit, and you must not try to guess what the information might have been.

4 . Testimony and exhibits that I strike from the record, or tell you to disregard, are not evidence, and you must not consider them.

5. Anything you see or hear about this case outside the courtroom is not evidence, and you must not consider it [unless I specifically tell you otherwise].

Also, I might tell you that you can consider a piece of evidence for one purpose only, and not for any other purpose. If that happens, I will tell you what purpose you can consider the evidence for and what you are not allowed to consider it for. [You need to pay close attention when I give an instruction about evidence that you can consider for only certain purposes, because you might not have that instruction in writing later in the jury room.]

[Some of you may have heard the terms "direct evidence" and "circumstantial evidence." You should not be concerned with those terms, since the law makes no distinction between the weight to be given to direct and circumstantial evidence.]

1.03 BENCH CONFERENCES AND RECESSES

During the trial, I will sometimes need to talk privately with the lawyers. I may talk with them here at the bench while you are in the courtroom, or I may call a recess and let you leave the courtroom while I talk with the lawyers. Either way, please understand that while you are waiting, we are working. We have these conferences to make sure that the trial is proceeding according to the law and to avoid confusion or mistakes. We will do what we can to limit the number of these conferences and to keep them as short as possible.

1.04 NO TRANSCRIPT AVAILABLE [NOTE-TAKING]

At the end of the trial, you will have to make your decision based on what you recall of the evidence. You will not have a written copy of the testimony to refer to. Because of this, you have to pay close attention to the testimony and other evidence as it is presented here in the courtroom.

[If you wish, however, you may take notes to help you remember what witnesses say. If you do take notes, do not show them to anyone until you and your fellow jurors go to the jury room to decide the case after you have heard and seen all of the evidence. And do not let taking notes distract you from paying close attention to the evidence as it is presented. The Clerk will provide each of you with a pad of paper and a pen or pencil. At each recess, leave them _____.]

[When you leave at night, your notes will be locked up and will not be read by anyone.]

Preliminary Instructions for Use at Commencement of Trial

1.04A QUESTIONS BY JURORS

When the lawyers have finished asking all of their questions of a witness, you will be allowed to ask the witness questions (describe procedure to be used here). I will tell you if the rules of evidence do not allow a particular question to be asked. After all of your questions, if there are any, the lawyers may ask more questions. [Do not be concerned or embarrassed if your question is not asked; sometimes even the lawyers' questions are not allowed.]

Preliminary Instructions for Use at Commencement of Trial

1.05. CONDUCT OF THE JURY

Jurors, to make sure this trial is fair to [both/all] parties, you must follow these rules:

First, do not talk or communicate among yourselves about this case, or about anyone involved with it, until the end of the case when you go to the jury room to consider your verdict.

Second, do not talk with anyone else about this case, or about anyone involved with it, until the trial has ended and you have been discharged as jurors.

Third, when you are outside the courtroom, do not let anyone tell you anything about the case, or about anyone involved with it [until the trial has ended and your verdict has been accepted by me]. If someone tries to talk to you about the case [during the trial], please report it to the [bailiff] [deputy clerk]. (Describe person.)

Fourth, during the trial, do not talk with or speak to any of the parties, lawyers, or witnesses in this case – not even to pass the time of day. It is important not only that you do justice in this case, but also that you act accordingly. If a person from one side of the lawsuit sees you talking to a person from the other side – even if it is just about the weather – that might raise a suspicion about your fairness. So, when the lawyers, parties and witnesses do not speak to you in the halls, on the elevator or the like, you [must] understand that they are not being rude. They know they are not supposed to talk to you while the trial is going on, and they are just following the rules.

Fifth, you may need to tell your family, close friends, and other people that you are a part of this trial. You can tell them when you have to be in court, and you can warn them not to ask you about this case, tell you anything they know or think they know about this case, or talk about this case in front of you. But, you must not communicate with anyone or post information about the parties, witnesses, participants, [claims] [charges], evidence, or anything else related to this case. You must not tell anyone anything about the jury's deliberations in this case until after I accept your verdict or until

I give you specific permission to do so. If you talk about the case with someone besides the other jurors during deliberations, it looks as if you might already have decided the case or that you might be influenced in your verdict by their opinions. That would not be fair to the parties, and it might result in the verdict being thrown out and the case having to be tried over again. During the trial, while you are in the courthouse and after you leave for the day, do not give any information to anyone, by any means, about this case. For example, do not talk face-to-face or use any electronic device, such as a telephone, cell phone, smart phone, Blackberry, PDA, computer, or computer-like device. Likewise, do not use the Internet or any Internet service; do not text or send instant messages; do not go on an Internet chat room, blog, or other websites such as Facebook, MySpace, YouTube, or Twitter. In other words, do not communicate with anyone about this case – except for the other jurors during deliberations – until I accept your verdict.

Sixth, do not do any research -- on the Internet, in libraries, newspapers, or otherwise – and do not investigate this case on your own. Do not visit or view any place discussed in this case, and do not use the Internet or other means to search for or view any place discussed in the testimony. Also, do not look up any information about this case, the law, or the people involved, including the parties, the witnesses, the lawyers, or [the judge/me/the court].

Seventh, do not read any news stories or Internet articles or blogs that are about the case, or about anyone involved with it. Do not listen to any radio or television reports about the case or about anyone involved with it. [In fact, until the trial is over I suggest that you avoid reading any newspapers or news journals at all, and avoid listening to any television or radio newscasts at all.] I do not know whether there will be news reports about this case, but if there are, you might accidentally find yourself reading or listening to something about the case. If you want, you can have someone clip out any stories and set them aside to give to you after the trial is over. [I can assure you, however, that by the

time you have heard all the evidence in this case, you will know what you need to [decide it] [return a just verdict].

The parties have a right to have you decide their case based only on evidence admitted here in court. If you research, investigate, or experiment on your own, or get information from other [places] [sources], your verdict might be influenced by inaccurate, incomplete, or misleading information. Witnesses here in court take an oath to tell the truth, and the accuracy of their testimony is tested through cross-examination. All of the parties are entitled to a fair trial and an impartial jury, and you have to conduct yourselves in a way that assures the integrity of the trial process. If you decide a case based on information not admitted in court, you will deny the parties a fair trial. You will deny them justice. Remember, you have taken an oath to follow the rules, and you must do so. [If you do not, the case might have to be retried, and you could be held in contempt of court and possibly punished.]

Eighth, do not make up your mind during the trial about what your verdict should be. Keep an open mind until after you and your fellow jurors have discussed all the evidence.

Preliminary Instructions for Use at Commencement of Trial

1.06 OUTLINE OF TRIAL

The trial will proceed in the following manner:

First, the plaintiff[’s][s’] lawyer may make an opening statement. Next, the defendant[’s][s’] lawyer may make an opening statement. An opening statement is not evidence, but it is a summary of the evidence the lawyers expect you will see and hear during the trial.

After opening statements, the plaintiff[s] will then present evidence. The defendant[’s][s’] lawyer will have a chance to cross-examine the plaintiff[’s][s’] witness[es]. After the plaintiff[s] [has/have] finished presenting [his/her/their] case, the defendant[s] may present evidence, and the plaintiff[’s][s’] lawyer will have a chance to cross-examine [his/her/their] witness[es].

[After you have seen and heard all of the evidence from [both/all] sides, the lawyers will make closing arguments that summarize and interpret the evidence. Just as with opening statements, closing arguments are not evidence. After the closing arguments, I will instruct you further on the law, and you will go to the jury room to deliberate and decide on your verdict.]

2. INSTRUCTIONS FOR USE DURING TRIAL

Introductory Comment

Instructions contained in this section may be read to the jury during the course of the trial. They are not generally intended for submission in written form at the conclusion of the case, although there is no particular reason why, in appropriate circumstances, they could not be submitted to the jury as part of the written package. Generally, they will not be reread to the jury at the conclusion of the case, although the court has discretion to do so.

Instructions for Use During Trial

2.01 DUTIES OF JURY: RECESSES

During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends. Do not allow anyone to discuss the case with you or within your hearing. "Do not discuss" also means do not e-mail, send text messages, blog or engage in any other form of written, oral or electronic communication, as I instructed you before.

Do not read any newspaper or other written account, watch any televised account, or listen to any radio program on the subject of this trial. Do not conduct any Internet research or consult with any other sources about this case, the people involved in the case, or its general subject matter. You must keep your mind open and free of outside information. Only in this way will you be able to decide the case fairly based solely on the evidence and my instructions on the law. If you decide this case on anything else, you will have done an injustice. It is very important that you follow these instructions.

I may not repeat these things to you before every recess, but keep them in mind throughout the trial.[1]

Notes on Use

1. This language may be omitted for subsequent breaks during trial, but not for overnight or weekend recesses.

Instructions for Use During Trial

2.02 STIPULATED TESTIMONY

The plaintiff[s] and the defendant[s] have stipulated - that is, they have agreed - that if _____ were called as a witness [(he) (she)] would testify in the way counsel have just stated. You should accept that as being _____'s testimony, just as if it had been given here in court from the witness stand.

Committee Comments

There is, of course, a difference between stipulating that a witness would give certain testimony, and stipulating that certain facts are established. *United States v. Lambert*, 604 F.2d 594, 595 (8th Cir. 1979). As to the latter kind of stipulation, *see infra* Model Instruction 2.03.

See 8th Cir. Crim. Jury Instr. 2.02 (2008); Federal Judicial Center, *Pattern Criminal Jury Instructions* 11 (1988); *9th Cir. Crim. Jury Instr.* 2.3 (2003); *9th Cir. Civ. Jury Instr.* 2.1 (2007). *See generally* West Key # "Stipulations" 1-21; "Criminal Law" 1172.1(2).

Instructions for Use During Trial

2.03 STIPULATED FACTS

The plaintiff[s] and the defendant[s] have stipulated -- that is, they have agreed -- that certain facts are as counsel have just stated. You should, therefore, treat those facts as having been proved.

Committee Comments

There is, of course, a difference between stipulating that certain facts are established, and stipulating that a witness would give certain testimony. *United States v. Lambert*, 604 F.2d 594, 595 (8th Cir. 1979). As to the latter kind of stipulation, *see infra* Model Instruction 2.02.

When parties enter into stipulations as to material facts, those facts will be deemed to have been conclusively proved, and the jury may be so instructed. *United States v. Houston*, 547 F.2d 104, 107 (9th Cir. 1976).

See 8th Cir. Crim. Jury Instr. 2.03 (2008); Federal Judicial Center, *Pattern Criminal Jury Instructions* 12 (1988); *9th Cir. Crim. Jury Instr.* 2.4 (2003); *9th Cir. Civ. Jury Instr.* 2.2 (2007). *See generally* West Key # "Stipulations" 1-21, "Criminal Law" 1172.1(2).

Instructions for Use During Trial

2.04 JUDICIAL NOTICE

I have decided to accept as proved the following fact[s]: _____.

You must accept [(this) (these)] fact[s] as proved.

Committee Comments

An instruction regarding judicial notice should be given at the time notice is taken.

Fed. R. Evid. 201(g), while permitting the judge to determine that a fact is sufficiently undisputed to be judicially noticed, also requires that the jury be instructed that it must accept as conclusive any fact judicially noticed in a civil case.

See 8th Cir. Crim. Jury Instr. 2.04 (2008); Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102.20 (5th ed. 2000); Federal Judicial Center, *Pattern Criminal Jury Instructions* 7 (1988); *9th Cir. Crim. Jury Instr.* 2.5 (2003); *9th Cir. Civ. Jury Instr.* 2.3 (2007). *See generally* Fed. R. Evid. 201; West Key # "Evidence" 1-52.

Instructions for Use During Trial

2.05 TRANSCRIPT OF TAPE-RECORDED CONVERSATION

As you have [also] heard, there is a typewritten transcript of the tape recording [I just mentioned] [you are about to hear]. That transcript also undertakes to identify the speakers engaged in the conversation.

You are permitted to have the transcript for the limited purpose of helping you follow the conversation as you listen to the tape recording, and also to help you identify the speakers. The tape recording is evidence for you to consider. The transcript, however, is not evidence.

You are specifically instructed that whether the transcript correctly or incorrectly reflects the conversation or the identity of the speakers is entirely for you to decide based upon what you have heard here about the preparation of the transcript, and upon your own examination of the transcript in relation to what you hear on the tape recording. The tape recording itself is the primary evidence of its own contents. If you decide that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.

Differences between what you hear in the recording and read in the transcript may be caused by such things as the inflection in a speaker's voice, or by inaccuracies in the transcript. You should, therefore, rely on what you hear rather than what you read when there is a difference.

Committee Comments

The transcript, absent stipulation of the parties, should not go to the jury room. *See United States v. Kirk*, 534 F.2d 1262 (8th Cir. 1976), *cert. denied*, 430 U.S. 906 (1977), *reversed, in part, on other grounds*, 723 F.2d 1379 (8th Cir. 1983).

See 8th Cir. Crim. Jury Instr. 2.06 (2008); *see generally United States v. McMillan*, 508 F.2d 101 (8th Cir. 1974); *United States v. Bentley*, 706 F.2d 1498 (8th Cir. 1983).

Instructions for Use During Trial

2.06 PREVIOUS TRIAL

You have heard evidence that there was a previous trial of this case. Keep in mind, however, that you must decide this case solely on the evidence presented to you in this trial. The fact of a previous trial should have no bearing on your decision in this case.[1]

Notes on Use

1. The instruction should be modified if the results of the prior trial are introduced.

Committee Comments

See 8th Cir. Crim. Jury Instr. 2.20 (2008); Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102.42 (5th ed. 2000); Federal Judicial Center, *Pattern Criminal Jury Instructions* 14 (1988); *9th Cir. Crim. Jury Instr.* 2.14 (2003). *See generally* West Key # "Evidence" 575-83. This instruction should not be given unless specifically requested.

Instructions for Use During Trial

2.07 CROSS-EXAMINATION OF PARTY'S CHARACTER WITNESS

The questions and answers you have just heard were permitted only to help you decide if the witness really knew about _____"s[1] reputation for truthfulness.[2] The information developed on that subject may not be used by you for any other purpose.[3]

Notes on Use

1. Insert name of person whose character is being challenged.

2. Fed. R. Evid. 404(a) and 608 generally limit character evidence in civil cases to reputation for truth and veracity. It may involve cross-examination on character traits which relate to truth and veracity (gave false information to a law enforcement officer; falsified expense account records).

3. This instruction should be given if requested by the party who has offered the character witness at the time the evidence is introduced.

Committee Comments

See 8th Cir. Crim. Jury Instr. 2.10 (2008); Federal Judicial Center, *Pattern Criminal Jury Instructions* 52 (1988). *See generally* Fed. R. Evid. 404, 405; West Key # "Criminal Law" 673(2), "Witnesses" 274(1); and *see also Gross v. United States*, 394 F.2d 216 (8th Cir. 1968).

Instructions for Use During Trial

2.08A EVIDENCE ADMITTED AGAINST ONLY ONE PARTY

Each party is entitled to have the case decided solely on the evidence which applies to that party. Some of the evidence in this case is limited under the rules of evidence to one of the parties, and cannot be considered against the others.

The evidence you [are about to hear] [just heard][1] can be considered only in the case against _____.[2]

Notes on Use

1. If desired, the trial judge may give a brief summary of the evidence which is admitted against only one of the parties.

2. State name of party or parties.

Committee Comments

This type of instruction may be used when evidence limited to one or more parties is admitted. *Cf. United States v. Kelly*, 349 F.2d 720, 757 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966); *but see United States v. Polizzi*, 500 F.2d 856, 903 (9th Cir. 1974) (not error to refuse a defendant's requested instruction that no evidence introduced by the codefendants could be used against him or her where he or she rested at close of the plaintiff's case).

See 8th Cir. Crim. Jury Instr. 2.14 (2008); Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102.41 (5th ed. 2000); Federal Judicial Center, *Pattern Criminal Jury Instructions* 19 (1988); *9th Cir. Crim. Jury Instr.* 1.15 (2003). *See generally* West Key # "Criminal Law" 673(4), "Trial" 54(2).

Fed. R. Evid. 105 requires such an instruction if requested when evidence is admitted against less than all parties.

Instructions for Use During Trial

2.08B EVIDENCE ADMITTED FOR LIMITED PURPOSE

The evidence [(you are about to hear) (you have just heard)] may be considered by you only on the [(issue) (question)] _____. It may not be considered for any other purpose.

Committee Comments

Such an instruction is appropriate at the time evidence admitted for a limited purpose is received; for example, when a prior inconsistent statement is admitted, or evidence is admitted or prior similar incidents to prove notice by the defendant of a defect.

With respect to the use of prior inconsistent statements, Fed. R. Evid. 105 gives a party the right to require a limiting instruction explaining that the use of this evidence is limited to credibility. This instruction is appropriate for that purpose. Note, however, that the limiting instruction should not be given if the prior inconsistent statement was given under oath in a prior trial, hearing or deposition, because such prior sworn testimony of a witness is not hearsay and may be used to prove the truth of the matters asserted. Fed. R. Evid. 801(d)(1)(A).

See infra Model Instruction 3.03 for additional comments on credibility. *See 9th Cir. Crim. Jury Instr.* 1.5 (2003).

Instructions for Use During Trial

2.09 IMPEACHMENT OF WITNESS, PRIOR CONVICTION

You have heard evidence that witness[1] _____ has been convicted of [a crime] [crimes]. You may use that evidence only to help you decide whether to believe the witness and how much weight to give [(his) (her)] testimony.

Notes on Use

1. If the party in a civil case has a conviction which is introduced in evidence, it would be appropriate to modify Eighth Cir. Crim. Inst. 2.16 and give the following instruction, unless the evidence is admitted under Fed. R. Evid. 404(b) to prove motive, intent, plan, etc. Crim. Inst. 2.16, modified for civil cases is as follows:

> You [are about to hear] [have heard] evidence that (name) was previously convicted of [a] crime[s]. You may use that evidence only to help you decide whether to believe [(his) (her)] testimony and how much weight to give it. That evidence does not mean that [(he) (she)] engaged in the conduct alleged here, and you must not use that evidence as any proof [(he) (she)] engaged in that conduct.

If the evidence is admitted under Fed. R. Evid. 404(b), Crim. Inst. 2.08 may be modified and used.

Committee Comments

The admissibility of prior convictions to impeach a witness' credibility is governed by Fed. R. Evid. 609. If the conviction involves dishonesty or false statements, it may be admitted even if not a felony. Fed. R. Evid. 609. There is substantial dispute about how much information may be injected concerning the prior conviction. Some judges do not even allow evidence of what crime, or what punishment was involved. The judge may allow evidence of the specific crime committed and the sentence. *Ross v. Jones*, 888 F.2d 548, 551 (8th Cir. 1989). Fed. R. Evid. 105 gives a party the right to require a limiting instruction explaining that the use of this evidence is limited to credibility.

See 8th Cir. Crim. Jury Instr. 2.18 (2008); Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102.44 (5th ed. 2000); Federal Judicial Center, *Pattern Criminal Jury Instructions* 30 (1988); *5th Cir. Civ. Jury Instr.* 2.17 (2006); *9th Cir. Crim. Jury Instr.* 4.8 (2003); *9th Cir. Civ. Jury Instr.* 2.8 (2007). *See generally* Fed. R. Evid. 609, 105; West Key # "Witnesses" 344(1-5), 345 (1-4).

Instructions for Use During Trial

2.10A DEMONSTRATIVE SUMMARIES NOT RECEIVED AS EVIDENCE

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, or other underlying evidence in the case. Those charts or summaries are used for convenience. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the books, records or other underlying evidence.

Committee Comments

See 8th Cir. Crim. Jury Instr. 4.11 (2008).

This instruction should be given only where the chart or summary is used solely as demonstrative evidence. Where such exhibits are admitted into evidence pursuant to Fed. R. Evid. 1006, do *not* give this instruction. For summaries admitted as evidence pursuant to Fed. R. Evid. 1006, *see* Instruction 2.10B, *infra*.

Sending purely demonstrative charts to the jury room is disfavored. If they are submitted limiting instructions are strongly suggested. *United States v. Possick*, 849 F.2d 332, 339 (8th Cir. 1988). The court may advise the jury that demonstrative evidence will not be sent back to the jury room.

Instructions for Use During Trial

2.10B RULE 1006 SUMMARIES

You will remember that certain [schedules] [summaries] [charts] were admitted in evidence. You may use those [schedules] [summaries] [charts] as evidence, even though the underlying documents and records are not here.[1] [However, the [accuracy] [authenticity] of those [schedules] [summaries] [charts] has been challenged. It is for you to decide how much weight, if any, you will give to them. In making that decision, you should consider all of the testimony you heard about the way in which they were prepared.][2]

Notes on Use

1. This instruction is not necessary if a stipulation instruction has been given on the subject.

2. The bracketed portion of this instruction should be given if the accuracy or authenticity has been challenged.

Committee Comments

See 8th Cir. Crim. Jury Instr. 4.12 (2008). *See generally* Fed. R. Evid. 1006, 1008(c).

This instruction is based on Rule 1006 of the Federal Rules of Evidence, which permits summaries to be admitted as evidence without admission of the underlying documents as long as the opposing party has had an opportunity to examine and copy the documents at a reasonable time and place and if those underlying documents would be admissible. *Ford Motor Co. v. Auto Supply Co., Inc.*, 661 F.2d 1171, 1175-76 (8th Cir. 1981). The Rules contemplate that the summaries will not be admitted until the court has made a preliminary ruling as to their accuracy. *See* Fed. R. Evid. 104; *United States v. Robinson*, 774 F.2d 261, 276 (8th Cir. 1985).

As Rule 1008(c) makes clear, the trial judge makes only a preliminary determination regarding a Rule 1006 summary, the accuracy of which is challenged. The admission is within the sound discretion of the trial judge. *United States v. King*, 616 F.2d 1034, 1041 (8th Cir. 1980). If the determination is to admit the summary, the jury remains the final arbiter with respect to how much weight it will be given and should be instructed accordingly.

The "voluminous" requirement of Rule 1006 does not require that it literally be impossible to examine all the underlying records, but only that in-court examination would be an inconvenience. *United States v. Possick*, 849 F.2d 332, 339 (8th Cir. 1988).

Charts and diagrams admitted under Rule 1006 may be sent to the jury at the district court's discretion. *Possick*, 849 F.2d at 339; *United States v. Orlowski*, 808 F.2d 1283, 1289 (8th Cir. 1986); *United States v. Robinson*, 774 F.2d at 275.

Instructions for Use During Trial

When this type of exhibit is sent to the jury, a limiting instruction is appropriate, but failure to give an instruction on the use of charts is not reversible error. *Possick*, 849 F.2d at 340.

There may be cases in which a variety of summaries are before the jury, some being simply demonstrative evidence, some being unchallenged Rule 1006 summaries, and some being challenged Rule 1006 summaries. In that situation, or any variant thereof, it will be necessary for the trial court to distinguish between the various items, probably by exhibit number, and to frame an instruction which makes the appropriate distinctions.

Instructions for Use During Trial

2.11 WITHDRAWAL

The claim of the plaintiff[s] that the defendant[s] _____[1] is no longer before you and will not be decided by you.

Notes on Use

1. Describe briefly the claim which is being withdrawn. If a defendant is dismissed, modify the instruction as follows:

> The claim of plaintiff against defendant _____ is no longer before you and will not be decided by you.

(**Note:** If a counterclaim is dismissed, transpose the names of the plaintiff and the defendant.)

Committee Comments

This is a simplified form. An identical instruction, Model Instruction 3.05, *infra*, has been included in section 3 for advising the jury of the withdrawal of a claim at the end of the trial. This instruction is intended for use during the time at which the claim is withdrawn and may be modified and used for the withdrawal of counterclaims or affirmative defenses. If this instruction is given during the course of trial, it need not be given with the final instructions. The judge may wish to discuss the matter of withdrawal of a claim with the lawyers to obtain an agreement as to what the jurors are told.

See Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102.60 (5th ed. 2000).

Instructions for Use During Trial

2.12 DEPOSITION EVIDENCE AT TRIAL

Testimony will now be presented to you in the form of a deposition. A deposition is the recorded answers a witness made under oath to questions asked by lawyers before trial. The deposition testimony to be offered [was recorded in writing and now will be read to you] [was electronically videotaped and that recording now will be played for you]. You should consider the deposition testimony, and judge its credibility, as you would that of any witness who testifies here in person. [You should not place any significance on the manner or tone of voice used to read the witness's answers to you.]

Committee Comments

This instruction should be given when deposition testimony is offered and allowed as substantive evidence. *See* Fed. R. Evid. 801(d)(2), 804(b)(1); Fed. R. Civ. P. 32(a). The Committee recommends that this instruction be given immediately before a deposition is read or electronically played to the jury. If a successive deposition is offered into evidence, the court may remind the jury of this instruction instead of repeating the entire instruction.

This instruction should not be used when deposition testimony is used for impeachment purposes only. Fed. R. Civ. P. 32(a)(2).

3. INSTRUCTIONS FOR USE AT CLOSE OF TRIAL
Introductory Comment

If issue/element instructions are submitted to the jury in writing, then these general instructions should also be submitted in writing at the same time. They are intended as general instructions to be submitted after all evidence has been presented. They may be given either before or after closing arguments, or may be given partially before and partially after arguments. Fed. R. Civ. P. 51.

The elements instructions included herein all have what might be called a converse tail; that is, a last sentence which tells the jury their verdict must be for the defendant if any of the elements have not been proved. It would also be proper if the court or parties desire, to delete that sentence and have a separate instruction which tells the jury their verdict must be for the defendant unless they find that any required element of the plaintiff's case has not been proved. *See infra* Model Instruction 7.02A for the format to be used for such instruction. This approach has the advantage of letting a defendant "target" or "focus" the case on the element which is most contested. It also may aid the jury to know where their attention should be focused.

Instructions for Use at Close of Trial

3.01 EXPLANATORY

Members of the jury, the instructions I gave at the beginning of the trial and during the trial are still in effect. Now I am going to give you some additional instructions.

You have to follow all of my instructions – the ones I gave you earlier, as well as those I give you now. Do not single out some instructions and ignore others, because they are all important. [This is true even though I am not going to repeat some of the instructions I gave you [at the beginning of] [during] the trial.]

[1]You will have copies of [the instructions I am about to give you now] [all of the instructions] in the jury room. [You will have copies of some of the instructions with you in the jury room; others you will not have copies of. This does not mean some instructions are more important than others.] Remember, you have to follow all instructions, no matter when I give them, whether or not you have written copies.

Notes on Use

1. Optional for use when the final instructions are to be sent to the jury room with the jury. The Committee recommends that practice.

Committee Comments

See Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 103.01 (5th ed. 2000). *See generally* West Key # "Criminal Law" 887.

Instructions for Use at Close of Trial

3.02 JUDGE'S OPINION

I have not intended to suggest what I think your verdict[s] should be by any of my rulings or comments during the trial.

[During this trial I have asked some questions of witnesses. Do not try to guess my opinion about any issues in the case based on the questions I asked.][1]

Notes on Use

1. Use only if judge has asked questions during the course of the trial.

Instructions for Use at Close of Trial

3.03 CREDIBILITY OF WITNESSES

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

You may consider a witness's intelligence; the opportunity the witness had to see or hear the things testified about; a witness's memory, knowledge, education, and experience; any reasons a witness might have for testifying a certain way, how a witness acted while testifying, whether a witness said something different at another time,[1] whether a witness's testimony sounded reasonable, and whether or to what extent a witness's testimony is consistent with other evidence you believe.

[In deciding whether to believe a witness, remember that people sometimes hear or see things differently and sometimes forget things. You will have to decide whether a contradiction is an innocent misrecollection, or a lapse of memory, or an intentional falsehood; that may depend on whether it has to do with an important fact or only a small detail.]

Notes on Use

1. With respect to the use of prior inconsistent statements, Fed. R. Evid. 105 gives a party the right to require a limiting instruction explaining that the use of this evidence is limited to credibility. Note, however, that such a limiting instruction should not be given if the prior inconsistent statement was given under oath in a prior trial, hearing or deposition, because such prior sworn testimony of a witness is not hearsay and may be used to prove the truth of the matters asserted. Fed. R. Evid. 801(d)(1)(A).

Committee Comments

The form of credibility instruction given is within the discretion of the trial court. *Clark v. United States*, 391 F.2d 57, 60 (8th Cir. 1968); *United States v. Merrival*, 600 F.2d 717, 719 (8th Cir. 1979). In *Clark* the court held that the following instruction given by the trial court correctly set out the factors to be considered by the jury in determining the credibility of the witnesses:

Instructions for Use at Close of Trial

> You are instructed that you are the sole judges of the credibility of the witnesses and of the weight and value to be given to their testimony. In determining such credibility and weight you will take into consideration the character of the witness, his or her demeanor on the stand, his or her interest, if any, in the result of the trial, his or her relation to or feeling toward the parties to the trial, the probability or improbability of his or her statements as well as all the other facts and circumstances given in evidence.

391 F.2d at 60. In *Merrival*, the court held that the following general credibility instruction provided protection for the accused:

> You, as jurors, are the sole judges of the truthfulness of the witnesses and the weight their testimony deserves.
>
> You should carefully study all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's ability to observe the matters as to which he or she has testified and whether each witness is either supported or contradicted by other evidence in the case.

600 F.2d at 720 n.2.

The general credibility instruction given in *United States v. Phillips*, 522 F.2d 388, 391 (8th Cir. 1975) covers other details:

> The jurors are the sole judges of the weight and credibility of the testimony and of the value to be given to each and any witness who has testified in the case. In reaching a conclusion as to what weight and value you ought to give to the testimony of any witness who has testified in the case, you are warranted in taking into consideration the interest of the witness in the result of the trial; take into consideration his or her relation to any party in interest; his or her demeanor upon the witness stand; his or her manner of testifying; his or her tendency to speak truthfully or falsely, as you may believe, the probability or improbability of the testimony given; his or her situation to see and observe; and his or her apparent capacity and willingness to truthfully and accurately tell you what he or she saw and observed; and if you believe any witness testified falsely as to any material issue in this case, then you must reject that which you believe to be false, and you may reject the whole or any part of the testimony of such witness. (Emphasis omitted.)

The instruction in the text is basically a paraphrase of *9th Cir. Crim. Jury Instr.* 3.9 (2003) and Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 101.43 (5th ed. 2000), as approved in *United States v. Hastings*, 577 F.2d 38, 42 (8th Cir. 1978). However, any factors set out in the *Phillips*, *Clark*, or *Merrival* instructions may be added in as deemed relevant to the case.

Instructions for Use at Close of Trial

A general instruction on the credibility of witnesses is in most cases sufficient. Whether a more specific credibility instruction is required with respect to any particular witness or class of witnesses is generally within the discretion of the trial court.

The credibility of a child witness is covered in Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 105.12 (5th ed. 2000). Ninth Circuit Instruction 4.15 recommends that no "child witness" instruction be given. This Committee joins in those comments.

The testimony of police officers is addressed in *Golliher v. United States*, 362 F.2d 594, 604 (8th Cir. 1966).

Factors to be taken into account in determining whether a special instruction is warranted with respect to a drug user are discussed in *United States v. Johnson*, 848 F.2d 904, 905-06 (8th Cir. 1988).

Whether a party is entitled to a more specific instruction on witness bias is also generally left to the discretion of the trial court. *See United States v. Ashford*, 530 F.2d 792, 799 (8th Cir. 1976).

See 9th Cir. Crim. Jury Instr. 3.9 (2003); Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 105.01 (5th ed. 2000); *11th Cir. Civ. Jury Instr.* 3 (2005); *United States v. Hastings*, 577 F.2d 38, 42 (8th Cir. 1978). *See generally* West Key # "Criminal Law" 785(1-16).

Instructions for Use at Close of Trial

3.04 BURDEN OF PROOF
(Ordinary Civil Case)

You will have to decide whether certain facts have been proved [by the greater weight of the evidence]. A fact has been proved [by the greater weight of the evidence], if you find that it is more likely true than not true. You decide that by considering all of the evidence and deciding what evidence is more believable.

You have probably heard the phrase "proof beyond a reasonable doubt." That is a stricter standard than "more likely true than not true." It applies in criminal cases, but not in this civil case; so put it out of your mind.

Committee Comments

The phrases which are bracketed are optional, depending upon the preference of the judge. The Committee recognizes that judges may desire to use the burden-of-proof formulation found in the pattern jury instructions adopted by their particular states. If such a burden-of-proof instruction is used, this instruction must be modified accordingly.

Instructions for Use at Close of Trial

3.05 WITHDRAWAL (OF CLAIM OR DEFENSE)

The claim of the plaintiff[s] that defendant[s] _____ [1] is no longer a part of this case, so you will not decide that claim.[2]

Notes on Use

1. Describe briefly the claim which is being withdrawn. If a defendant is dismissed, modify the instruction as follows:

> The claim of the plaintiff against defendant _____ is no longer a part of this case, so you will not consider it.

2. Describe briefly the defense which is being withdrawn. If a defense is withdrawn, modify the instruction as follows:

> The defense of _____ is no longer a part of the case, so you will not consider it.

Committee Comments

This instruction is intended for use during the time at which the claim is withdrawn and may be modified and used for the withdrawal of counterclaims or affirmative defenses. If this instruction is given during the course of trial, it need not be given with the final instructions. The judge may wish to discuss the matter of withdrawal of a claim with the lawyers to obtain an agreement as to what the jurors are told.

See Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 102.60 (5th ed. 2000).

3.06 ELECTION OF FOREPERSON; DUTY TO DELIBERATE; COMMUNICATIONS WITH COURT; CAUTIONARY; UNANIMOUS VERDICT; VERDICT FORM

There are rules you must follow when you go to the jury room to deliberate and return with your verdict.

First, you will select a foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement, if you can do this without going against what you believe to be the truth, because all jurors have to agree on the verdict.

Each of you must come to your own decision, but only after you have considered all the evidence, discussed the evidence fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your mind if the discussion persuades you that you should. But, do not come to a decision just because other jurors think it is right, or just to reach a verdict. Remember you are not for or against any party. You are judges – judges of the facts. Your only job is to study the evidence and decide what is true.

Third, if you need to communicate with me during your deliberations, send me a note signed by one or more of you. Give the note to the [marshal] [bailiff] [court security officer] and I will answer you as soon as I can, either in writing or here in court. While you are deliberating, do not tell anyone - including me - how many jurors are voting for any side.

Fourth, your verdict has to be based only on the evidence and on the law that I have given to you in my instructions. Nothing I have said or done was meant to suggest what I think your verdict should be. The verdict is entirely up to you.[1]

Finally, the verdict form is your written decision in this case. [The form reads: (read form)]. You will take [this] [these] form[s] to the jury room, and when you have all agreed on the verdict[s], your foreperson will fill in the form[s], sign and date [it] [them],

and tell the [marshal] [bailiff] [court security officer] that you are ready to return to the courtroom.

[If more than one form was furnished, you will bring the unused forms in with you.]

Notes on Use

1. The trial judge may give a fair summary of the evidence as long as the comments do not relieve the jury of its duty to find that each party has proved those elements of the case upon which such party has the burden of proof. Judges may, in appropriate cases, focus the jury on the primary disputed issues, but caution should be exercised in doing so. *See United States v. Neumann*, 887 F.2d 880, 882-83 (8th Cir. 1989) (en banc).

Committee Comments

If a hung jury is possible, use Model Instruction 3.07, *infra*.

Instructions for Use at Close of Trial

3.07 "ALLEN" CHARGE TO BE GIVEN AFTER EXTENDED DELIBERATION

As I told you earlier, it is your duty to consult with one another, deliberate, and try to reach agreement, if you can do that without violating your conscience. Of course, you must not give up your honest beliefs about the evidence just because of what other jurors believe to be the truth, or just because you want to reach a verdict. Each of you must decide the case for yourself, but only after considering and discussing the evidence with your fellow jurors.

When you deliberate, you should be willing to reexamine your own views and change your mind, if you decide you were mistaken. For all jurors to agree, you will have to openly and frankly examine and discuss the questions you have to decide. Listen to the opinions of others and be willing to re-examine your own views.

Finally, remember that you are not representing [either][any] side. You are, instead, judges - judges of the facts; judges of the believability of the witnesses; and judges of the weight of the evidence. Your only job is to find the truth from the evidence. You may take all the time you need.

There is no reason to think that this case would be tried in a better way or that a different jury would be more likely to reach a decision. If you cannot agree on a verdict, the case is left open, and it will have to be retried at some later time.[1]

[You are reasonable people. Please go back now to continue your deliberations using your best judgment.][2]

Notes on Use

1. A more expanded version of this instruction has been approved by this Circuit. *See United States v. Smith*, 635 F.2d 716, 722-23 (8th Cir. 1980) ; *United States v. Singletary*, 562 F.2d 1058, 1060-61 (8th Cir. 1977); *United States v. Hecht*, 705 F.2d 976, 979 (8th Cir. 1983).

2. Use this sentence when this charge is being given after deliberations have begun.

Instructions for Use at Close of Trial

Committee Comments

This instruction is a modification of *8th Cir. Crim. Jury Instr.* 10.02 (2008). *See also* the Committee Comments in that instruction. The language of this instruction covers the essential points of the traditional "Allen" charge, taken from the instruction approved in *United States v. Smith*, 635 F.2d 716, 722-23 (8th Cir. 1980). Judge Gibson noted in *Potter v. United States*, 691 F.2d 1275, 1277 (8th Cir. 1982) that "caution . . . dictates . . . that trial courts should avoid substantial departures from the formulations of the charge that have already received judicial approval."

It is not necessarily reversible error for the trial court to give a supplemental instruction *sua sponte* and even without direct announcement by the jury of its difficulty. *United States v. Smith*, 635 F.2d 716, 721 (8th Cir. 1980). The safe practice, however, would be to give such an instruction only after the jury has directly communicated its difficulty or the length of time spent in deliberations, compared with the nature of the issues and length of trial, and makes it clear that difficulty does exist. A premature supplemental charge certainly could, in an appropriate case, be sufficient cause for reversal.

The trial court may make reasonable inquiries to determine if a jury is truly deadlocked, but may not ask the jury of the nature and extent of its division. *Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Brasfield v. United States*, 272 U.S. 448 (1926); *United States v. Webb*, 816 F.2d 1263, 1266 (8th Cir. 1987). The fact that the court inadvertently learns the division of the jurors does not, by itself, prevent the giving of a supplemental charge. *United States v. Cook*, 663 F.2d 808 (8th Cir. 1981); *Anderson v. United States*, 262 F.2d 764, 773-74 (8th Cir. 1959). Such an instruction can be coercive, however, where the sole dissenting juror is aware that the court knows his identity. *United States v. Sae-Chua*, 725 F.2d 530 (9th Cir. 1984).

In this circuit the defendant is not entitled to an instruction that the jury has the right to reach no decision. *United States v. Arpan*, 887 F.2d 873 (8th Cir. *en banc* 1989).

A court may give an Allen charge without consent of the lawyers. It has been widely approved by federal courts of appeal as a fair and reasonable way to urge jurors to reach a verdict. The Eighth Circuit, in criminal cases, has consistently upheld the authority of the court to give the Allen charge after extended jury deliberation *without* either requesting or receiving consent from the attorneys representing the parties. *See*, *e.g.*, *United States v. Singletary*, 562 F.2d 1058, 1060 (8th Cir. 1977); *United States v. Ringland*, 497 F.2d 1250, 1252-53 (8th Cir. 1974).

The Third Circuit has totally banned Allen charges, holding that such charges are overly coercive. *United States v. Fioravanti*, 412 F.2d 407 (3d Cir. 1969). The Tenth Circuit has cautioned that the Allen charge should be included, if at all, in the original instructions due to the

"inherent danger in this type of instruction when given to an apparently deadlocked jury." *United States v. Wynn*, 415 F.2d 135, 137 (10th Cir. 1969).

While the Eighth Circuit has "encouraged district courts to consider with particular care whether a supplemental *Allen* instruction is absolutely necessary under the circumstances," *Potter v. United States*, 691 F.2d 1275, 1277 (8th Cir. 1982) (citing *United States v. Smith*, 635 F.2d at 722), the Eighth Circuit has refused to adopt the Third Circuit ban on Allen charges. *United States v. Skillman*, 442 F.2d 542, 558 (8th Cir. 1971).

Although Allen charges have primarily been considered in criminal cases, courts in civil cases also have authority to give Allen charges. *See Railway Express Agency v. Mackay*, 181 F.2d 257, 262-63 (8th Cir. 1950); *Hill v. Wabash Ry. Co.*, 1 F.2d 626, 631 (8th Cir. 1924). *See also* 3 Sand, Siffert, Reiss, Sexton and Thrope, *Modern Federal Jury Instructions*, Instruction 78-4 Comment, p. 78-12 to 78-13 (1990). Therefore, courts in both criminal and civil cases have the authority to give Allen charges without the consent of attorneys for the parties.

4. PRISONER/PRETRIAL DETAINEE CIVIL RIGHTS CASES
Introductory Comment

Section 4 contains jury instructions relating primarily to prisoner civil rights cases. This section is organized as follows:

4.10 - 4.19	Instructions covering cases filed by individuals who are complaining of the manner in which they were treated at the time they were arrested and before they were placed in confinement (governed generally by the Fourth Amendment);
4.20 - 4.29	Instructions covering complaints filed by individuals after they are placed in confinement but before they are convicted (pretrial detainees) (governed generally by the Fifth and Fourteenth Amendments due process clauses which require that force be reasonably related to legitimate institutional needs); and
4.30 - 4.39	Instructions covering complaints filed by individuals after they are sentenced (governed generally by the Eighth Amendment).
4.40 - 4.49	Definitions
4.50 - 4.59	Damages
4.60 - 4.69	Verdict Forms

4.10 EXCESSIVE USE OF FORCE - ARREST OR OTHER SEIZURE OF PERSON - BEFORE CONFINEMENT - FOURTH AMENDMENT

Your verdict must be for the plaintiff [and against defendant _____][1] [here generally describe the claim][2] if all the following elements have been proved[3]:

First, the defendant [here describe an act such as "struck, hit, kicked, or shot"][4] the plaintiff when [arresting or stopping][5] [him] [her], and

Second, the force used was excessive because it was not reasonably necessary to [here describe the purpose for which force was used such as "arrest the plaintiff," or "take the plaintiff into custody," or "stop the plaintiff for investigation"]; and

Third, as a direct result, the plaintiff was injured;[6] and

[*Fourth*, the defendant was acting under color of state law.][7]

In determining whether the force, [if any][8] was "excessive," you must consider: the need for the application of force; the relationship between the need and the amount of force that was used the extent of the injury inflicted; and whether a reasonable officer on the scene, without the benefit of hindsight, would have used that much force under similar circumstances. [You should keep in mind that the decision about how much force to use often must be made in circumstances that are tense, uncertain and rapidly changing.][9] [Deadly force[10] may be used only if it is reasonably believed necessary to [(apprehend a dangerous, fleeing felon) (prevent a significant threat of death or serious physical harm to the officer or others)].[11] A warning must be given, if [feasible] [possible], before deadly force may be used.] You must [decide] [determine] whether the officer's actions were reasonable in the light of the facts and circumstances confronting the officer [without regard to the officer's own state of mind, intention or motivation].[12]

If any of the above elements has not been proved, then your verdict must be for the defendant.

["Deadly force" is force intended or reasonably likely to cause death or serious physical injury.][13]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Describe the claim if the plaintiff has more than one claim against this defendant.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. The conduct indicated by the plaintiff's evidence should be described generally. This instruction assumes that probable cause for the arrest or stop is not in dispute. If it is in issue, that claim should be submitted in a separate instruction.

5. Here describe the nature of the seizure of the plaintiff in which the defendant was engaged.

6. A finding that the plaintiff suffered some actual injury or damage is necessary before an award of substantial compensatory damages may be made under 42 U.S.C. § 1983. Dawkins v. Graham, 50 F.3d 532, 535 (8th Cir. 1995). Specific language which describes the damage the plaintiff suffered may be included here and in the damage instruction. Model Instruction 4.50A, *infra*.

A nominal damages instruction may have to be submitted under *Cowans v. Wyrick*, 862 F.2d 697, 700 (8th Cir. 1988). *See infra* Model Instruction 4.50B.

7. Use this language if there is an issue as to whether the defendant was acting under color of state law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, this element will be conceded by the defendant. If so, it need not be included in this instruction. Color of state law will have to be defined on the factual issue specified if this paragraph is used. *See infra* Model Instruction 4.40.

8. Include this phrase if the defendant denies the use of any force.

9. Add this phrase if appropriate. *See Graham v. Connor*, 490 U.S. 386 (1989). It should not be used if repetitious. *See Billingsley v. City of Omaha*, 277 F.3d 990 (8th Cir. 2002). It need not be included if the defendant denies all use of force. *Boesing v. Spiess*, 540 F.3d 886 (8th Cir. 2008).

10. Add the definition of deadly force if the phrase is used in the instruction.

11. Add this phrase or other appropriate language if deadly force is used. *See Rahn v. Hawkins*, 464 F.3d 813 (8th Cir. 2006); *Tennessee v. Garner*, 471 U.S. 1 (1985).

12. Add this phrase if there is evidence of the defendant officer's ill will toward the plaintiff. *See Graham v. Connor*, 490 U.S. 386 (1989).

13. Use this or another definition if deadly force was used, or may have been used. *See Kuha v. City of Minnetonka*, 365 F.3d 590, 597-98 (8th Cir. 2004) (use of police dog not deadly force); RESTATEMENT 2d OF TORTS § 131 (1965); *Black's Law Dictionary*, 718 (9th ed. 2009) ("violent action known to create a substantial risk of causing death or serious bodily harm"). There are a variety of formulations, all of which are similar.

Committee Comments

This instruction should be used only in connection with claims that excessive force was used to arrest, stop for investigation, or otherwise seize a plaintiff. In *Graham v. Connor*, 490 U.S. 386 (1989), the Supreme Court held that a "reasonableness" standard, derived from the Fourth Amendment, applied in cases involving the use of force in making an arrest or an investigatory stop or other seizure. *Id.* at 393-94. *See also Andrews v. Neer*, 253 F.3d 1052, 1060 (8th Cir. 2001) (if the victim is an arrestee, the Fourth Amendment's "objective reasonableness" standard controls). *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993). This instruction does not cover cases involving injuries to persons other than to the suspect. For the elements in that circumstance, *see Terrell v. Larson*, 396 F.3d 975 (8th Cir. 2005) (en banc).

In *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985), the Court held: "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. * * * Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *See also Scott v. Harris*, 550 U.S. 372 (2007) (high speed chase); *Rahn v. Hawkins*, 464 F.3d 813 (8th Cir. 2006).

A threat to use deadly force is not generally considered a deadly force. *See* § 3.11(2), Model Penal Code; *Black's Law Dictionary*, 718 (9th ed. 2009).

Once an individual becomes a pretrial detainee, the use of force is measured by a substantive due process standard of the Fifth and Fourteenth Amendments. *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1048-49 (8th Cir. 1989). *See generally*, Model Instruction 4.20, *infra*, for use of excessive force claims of pretrial detainees. The Eighth Circuit has not decided when the person's status changes from "arrestee" to "pretrial detainee." *Andrews v. Neer*, 253 F.3d 1052, 1060-61 (8th Cir. 2001) (8th Circuit has not drawn bright line dividing the end of arrestee's status). However, a review of Eighth Circuit case law indicates that status as pretrial detainee begins sometime after the arrest and completion of the booking process. *See Wilson v. Spain*, 209 F.3d 713, 715-16 (8th Cir. 2000) (discussing the split of the federal circuit courts on this issue, and history of the 8th Circuit's holdings). *See also Chambers v. Pennycook*, 641 F.3d

898 (8th Cir. 2011). The individual's status as a pretrial detainee continues until he or she has been sentenced. *Williams-El v. Johnson*, 872 F.2d 224, 228-29 (8th Cir. 1989) (a person convicted, not yet sentenced, is still a pretrial detainee). *See also Wilson*, 209 F.3d at 715.

"To establish a constitutional violation under the Fourth Amendment's right to be free from excessive force, the test is whether the amount of force used was objectively reasonable under the particular circumstances." *Brown v. City of Golden Valley*, 574 F.3d 491, 496 (8th Cir. 2009). While the degree of injury suffered "is certainly relevant in so far as it tends to show the amount and type of force used," a de minimis injury does not foreclose an excessive force claim brought under the Fourth Amendment. *Chambers v. Pennycook*, 641 F.3d 898, 906 (8th Cir. 2011).

4.20 EXCESSIVE USE OF FORCE - PRETRIAL DETAINEES - FIFTH AND FOURTEENTH AMENDMENTS

Your verdict must be for the plaintiff [and against defendant _____][1] [here generally describe the claim][2] if all the following elements have been proved[3]:

First, the defendant [here describe an act such as "struck, hit, kicked, or shot"][4] the plaintiff, and

Second, the force used was excessive because it was not reasonably necessary to [here describe the purpose for which force was used such as "restore order," or "maintain discipline,"][5], and

Third, as a direct result, the plaintiff was injured,[6] and

[*Fourth*, the defendant was acting under color of state law.][7]

In determining whether the force [if any][8] was excessive, you must consider: the need for the application of force; the relationship between the need and the amount of force that was used; the extent of the injury inflicted; whether it was used for punishment rather than for a legitimate purpose such as maintaining order or security within [here describe the facility in which the plaintiff was incarcerated]; and whether a reasonable officer on the scene would have used the same force under similar circumstances. [You should keep in mind that the decision about how much force to use often must be made in circumstances that are tense, uncertain and rapidly changing.][9] [Deadly force[10] may be used only if it is reasonably believed necessary to [(apprehend a dangerous, fleeing felon) (prevent a significant threat of death or serious physical harm to the officer or others)].[11] A warning must be given, if [feasiblel [possible], before deadly force may be used.] You must [decide] [determine] whether the officer's actions were reasonable in the light of the facts and circumstances confronting the officer [without regard to the officer's own state of mind, intention or motivation].[12]

If any of the above elements has not been proved, then your verdict must be for the defendant.

["Deadly force" is force intended or reasonably likely to cause death or serious physical injury.][13]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Describe the claim if the plaintiff has more than one claim against this defendant.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. The conduct indicated by the plaintiff's evidence should be described generally. This instruction assumes that probable cause for the arrest or stop is not in dispute. If it is in issue, that claim should be submitted in a separate instruction.

5. *See Johnson-El v. Schoemehl*, 878 F.2d 1043, 1048 (8th Cir. 1989), and *Andrews v. Neer*, 253 F.3d 1052, 1060-61 (8th Cir. 2001), for the standard for the pretrial detainee who is in custody. This instruction applies to persons who are not yet in custody at the time the excessive force is alleged to have occurred.

6. Specific language which describes the damage the plaintiff suffered may be included here, and in the damage instruction, Model Instruction 4.50A, *infra*. Nominal damages will also have to be submitted under *Cowans v. Wyrick,* 862 F. 2d 697, 700 (8th Cir. 1988). *See infra* Model Instruction 4.50B.

7. Use this language if there is an issue as to whether the defendant was acting under color of state law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, this element will be conceded by the defendant. If so, it need not be included in this instruction. Color of state law will have to be defined on the factual issue specified if this paragraph is used. *See infra* Model Instruction 4.40.

8. Include this phrase if the defendant denies the use of any force.

9. Add this phrase or other appropriate language if deadly force is used. *See Rahn v. Hawkins*, 464 F.3d 813 (8th Cir. 2006); *Tennessee v. Garner*, 471 U.S. 1 (1985). It need not be included if the defendant denies all use of force. *Boesing v. Spiess*, 540 F.3d 886 (8th Cir. 2008).

10. Add the definition of deadly force if the phrase is used in the instruction.

11. Add this phrase or other appropriate language if deadly force is used. *See Rahn v. Hawkins*, 464 F.3d 813 (8th Cir. 2006); *Tennessee v. Garner*, 471 U.S. 1 (1985).

12. Add this phrase if there is evidence of the defendant officer's ill will toward the plaintiff. *See Graham v. Connor*, 490 U.S. 386 (1989).

13. Use this or another definition if deadly force was used, or may have been used. *See Kuha v. City of Minnetonka*, 365 F.3d 590, 597-98 (8th Cir. 2004) (use of police dog not deadly force); *Black's Law Dictionary*, 718 (9th ed. 2001) ("violent action known to create a substantial risk of causing death or serious bodily harm"). There are a variety of formulations, all of which are similar.

Committee Comments

At the time of arrest, a person's right to be free from excessive force is determined under the Fourth Amendment. *See infra* Committee Comments to Model Instruction 4.10. However, different constitutional protections may apply at different junctures of the custodial continuum running through initial arrest to post-conviction incarceration. *See Andrews v. Neer*, 253 F.3d 1052 (8th Cir. 2001). Precisely *when* the standards shift is the subject of debate. *See Wilson v. Spain*, 209 F.3d 713, 715 (8th Cir. 2000).

Once an individual becomes a pretrial detainee, the use of force is measured by a substantive due process standard of the Fifth and Fourteenth Amendments. *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1048-49 (8th Cir. 1989). *See generally*, Model Instruction 4.20, *infra*, for use of excessive force claims of pretrial detainees. The Eighth Circuit has not decided when the person's status changes from "arrestee" to "pretrial detainee." *Andrews v. Neer*, 253 F.3d 1052, 1060-61 (8th Cir. 2001) (8th Circuit has not drawn bright line dividing the end of arrestee's status). However, a review of Eighth Circuit case law appears to indicate that status as pretrial detainee begins sometime after the arrest and completion of the booking process. *See Wilson v. Spain*, 209 F.3d 713, 715-16 (8th Cir. 2000) (discussing the split of the federal circuit courts on this issue, and history of the 8th Circuit's holdings). *See also Chambers v. Pennycook*, 641 F.3d 898, 905 (8th Cir. 2011). The individual's status as a pretrial detainee continues until he or she has been sentenced. *Williams-El v. Johnson*, 872 F.2d 224, 228-29 (8th Cir. 1989) (a person convicted, not yet sentenced, is still a pretrial detainee). *See also Wilson*, 209 F.3d at 715.

Under the Fourteenth Amendment, a pretrial detainee's constitutional rights are violated if the detainee's conditions of confinement amount to punishment. *Morris v. Zefferi*, 601 F.3d 805, 809 (8th Cir. 2010). This is because an inmate who is a pretrial detainee cannot be punished prior to an adjudication of guilt. *Id. See also Bell v. Wolfish*, 441 U.S. 520 (1979). Constitutionally infirm practices are those that are punitive in intent, those that are not rationally related to legitimate purpose or those that are rationally related but are excessive in light of their purpose. *Johnson-El*, 878 F.2d at 1048. While technically under the Fourteenth Amendment, as a practical matter, a pretrial detainee's rights are analyzed under the Eighth Amendment the same as a convicted prisoner's rights. *Kahle v. Leonard*, 477 F.3d 544, 550 (8th Cir. 2007). *See also Morris*, 601 F.3d at 809. "Pretrial detainees are entitled to at least as great protection under the Fourteenth Amendment as that afforded convicted prisoners under the Eighth Amendment." *Morris*, 601 F.3d at 809. *See also Kahle*, 477 F.3d at 550. However, it has been suggested by the Eighth Circuit that the burden of showing a constitutional violation is lighter for pretrial detainees under the Fourteenth Amendment than for post-conviction prisoners under the Eighth Amendment. *Morris*, 601 F.3d at 809.

A pre-trial detainee's excessive-force claim also is grounded in the due process clause of the Fifth and Fourteenth Amendments, rather than the Fourth or Eighth Amendments. However, the analysis is the same as one brought under the Fourth Amendment. The use of force must be objectively reasonable in the light of the situation presented. *Andrews v. Neer*, 253 F.3d 1052, 1060 (8th Cir. 2001) (citing *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1048-49 (8th Cir. 1989)).

When making this determination, the court must consider: (1) the need for applying force; (2) the relationship between that need and amount of force used; (3) the threat reasonably perceived; (4) the extent of injury inflicted; (5) whether force was used for punishment or instead to achieve a legitimate purpose such as maintaining order or security; and (6) whether a reasonable officer on the scene would have used such force under similar circumstances. *Andrews*, 253 F.3d at 1061, n.7.

In evaluating an excessive-force claim under the Fourth Amendment, the Eighth Circuit recently observed, the degree of injury suffered in an excessive-force case "is certainly relevant insofar as it tends to show the amount and type of force used." *Chambers v. Pennycook*, 641 F.3d 898, 906 (8th Cir. 2011); *Rohrbough v. Hall*, 586 F.3d 582, 586 (8th Cir. 2009) ("A court may also evaluate the extent of the [plaintiff's] injuries."). However, a de minimis injury does not foreclose a Fourth Amendment excessive-force claim. *Chambers*, 641 F.3d at 906.

Similarly, in evaluating an excessive-force claim under the Eighth Amendment, the United States Supreme Court in *Wilkins v. Gaddy*, ___ U.S. ___, 130 S.Ct. 1175, 1178 (2010) (citing *Hudson v. McMillian*, 503 U.S. 1, 7, 112 S.Ct. 995 (1992)), stated that although the extent of physical injury may be relevant, it is only one factor that may be used to determine "whether the use of force could plausibly have been thought necessary in a particular situation." (internal citation omitted).

Cases involving food, clothing, shelter, medical care and reasonable safety must be decided under the deliberate indifference standard for both pretrial detainees and convicted prisoners. *Butler v. Fletcher*, 465 F.3d 340, 345 (8th Cir. 2006); *Crow v. Montgomery*, 403 F.3d 598 (8th Cir. 2005); *Whitnack v. Douglas County*, 16 F.3d 954 (8th Cir. 1994).

Prisoner/Pretrial Detainee Civil Rights Cases

4.30 EXCESSIVE USE OF FORCE - CONVICTED PRISONERS - EIGHTH AMENDMENT

Your verdict must be for the plaintiff [and against defendant _____][1] [here generally describe the claim][2] if all the following elements have been proved[3]:

First, the defendant [here describe an act such as "struck, hit, or kicked"][4] the plaintiff, and

Second, the force used was excessive and applied maliciously and sadistically[5] for the purpose of causing harm; [and not in a good faith effort to achieve a legitimate purpose;][6] and

Third, as a direct result, the plaintiff was injured,[7] and

[*Fourth*, the defendant was acting under color of state law.][8]

In determining whether the force[, if any][9] was excessive,[10] you must consider: the need for the application of force; the relationship between the need and the amount of force that was used[;] [and] the extent of the injury inflicted[; and whether the force was used to achieve a legitimate purpose or maliciously and sadistically for the purpose of causing harm].

"Maliciously" means intentionally injuring another without just cause or reason. "Sadistically" means engaging in extreme or excessive cruelty or delighting in cruelty.

If any of the above elements has not been proved, then your verdict must be for the defendant.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Describe the claim if the plaintiff has more than one claim against this defendant.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. The conduct indicated by the plaintiff's evidence should be described generally.

5. The issue of the defendant's intent must be addressed as an element of the claim. *Howard v. Barnett*, 21 F.3d 868 (8th Cir. 1994); *Cummings v. Malone*, 995 F.2d 817 (8th Cir. 1993). If the plaintiff claims force was used for an illegitimate purpose, for example, to deter his access to the courts, the trial judge should consider a modification of this phrase to reflect that improper purpose. If no force at all was appropriate, the term "excessive" could be replaced with "unnecessary." It has been suggested that the jury should not be directed to consider

whether the force was applied maliciously if institutional security was not involved. *See Wyatt v. Delaney*, 818 F.2d 21, 23 (8th Cir. 1987). However, this element repeatedly has been associated with Eighth Amendment violations in excessive force cases. *See Graham v. Connor; Whitley v. Albers. See also Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988). The cases frequently use the phrase "maliciously and sadistically." The Eighth Circuit has indicated that the term "sadistically" is necessary to a correct statement of the law. *Howard v. Barnett*, 21 F.3d 868 (8th Cir. 1994). In *Wilkins v. Gaddy*, ___ U.S. ___, 130 S. Ct. 1175, 1178 (2010), the Court stated the core judicial inquiry is whether force was applied in a good faith effort to maintain discipline, or maliciously and sadistically to cause harm. The term "sadistic," to some people, has sexual connotations. The Committee, therefore, recommends that both "maliciously" and "sadistically" be defined. *See infra* Model Instructions 4.45 and 4.46.

6. Use this phrase if the defendant acknowledges the use of force, but asserts that the force was used to achieve a legitimate purpose.

7. Specific language which describes the damage the plaintiff suffered may be included here, and in the damage instruction, Model Instruction 4.50A, *infra*. De minimis or modest nature of alleged injuries will no doubt limit the damages that can be recovered, but do not preclude an excessive force claim. *Wilkins v. Gaddy*, ___ U.S. ___, 130 S. Ct. 1175 (2010). The jury must award nominal damages if it finds the alleged injuries to have no monetary value or are insufficient to justify with reasonable certainty a more substantial measure of damages. *See Howard v. Barnett*, 21 F.3d 868, 873 (8th Cir. 1994) (citing *Cowans v. Wyrick*, 862 F.2d 697, 700 (8th Cir. 1988)). *See also infra* Model Instruction 4.50B.

8. Use this language if there is an issue as to whether the defendant was acting under color of state law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, this element will be conceded by the defendant. If so, it need not be included in this instruction. Color of state law will have to be defined on the factual issue specified if this paragraph is used. *See infra* Model Instruction 4.40.

9. Include this phrase if the defendant denies the use of any force.

10. If deadly force was used, it may be appropriate to modify this instruction to tell the jury when deadly force is allowed. *See Rahn v. Hawkins*, 464 F.3d 813 (8th Cir. 2006); *Tennessee v. Garner*, 471 U.S. 1 (1985).

Committee Comments

This instruction should be used only when a *convicted* person claims his or her constitutional rights were violated because of the use of force by a state official. If the plaintiff was a convicted prisoner at the time of the alleged violation, the appropriate standard derives from the Eighth Amendment. *Graham v. Connor*, 490 U.S. 386 (1989); *Whitley v. Albers*, 475 U.S. 312 (1986); *Hudson v. McMillian*, 503 U.S. 1 (1992).

The Committee recommends that an instruction *not* be given on qualified immunity based on defendant's good faith. A separate instruction is unnecessary because the issue/elements instruction itself requires the jury to assess the defendant's intent in an Eighth

Amendment context. *See Graham v. Connor*. Furthermore, the issue of good faith immunity is an issue the judge must decide; it is not a jury issue. *Coffman v. Trickey*, 884 F.2d 1057, 1062-63 (8th Cir. 1989). The elements instruction should set forth facts which, if found to be true, entitle the plaintiff to a verdict.

Two phrases frequently come up in these cases. One is "maliciously and sadistically for the very purpose of causing harm," and the other is "wanton infliction of pain." The Eighth Circuit cases of *Howard v. Barnett*, 21 F.3d 868 (8th Cir. 1994) and *Cummings v. Malone*, 995 F.2d 817 (8th Cir. 1993) place substantial emphasis on the use of the words "malicious" and "sadistic" in the instructions themselves. See *Wilkins v. Gaddy*. ___ U.S. ___, 130 S. Ct. 1175 (2010). Thus, the "wanton infliction of pain" clause has been eliminated.

4.31 DENIAL OF MEDICAL CARE - CONVICTED PRISONERS AND PRETRIAL DETAINEES (42 U.S.C. § 1983)

Your verdict must be for the plaintiff [and against defendant _____][1] [on the plaintiff's claim of deliberate indifference to [(his) (her)] serious medical need][2] if all of the following elements have been proved[3]:

First, the plaintiff had a serious need for [describe the plaintiff's medical need, such as "treatment for a broken leg" or "pain medication"], and

Second, the defendant was aware of the plaintiff's serious need for the ["medical care" or "pain medication"], and

Third, the defendant,[4] with deliberate indifference,[5] failed to ["provide the medical care" or "direct that the medical care be provided" or "allow the plaintiff to obtain the medical care needed"] [within a reasonable time],[6] and

Fourth, as a direct result, the plaintiff was injured,[7] and

[*Fifth*, the defendant was acting under color of state law.][8]

If any of the above elements has not been proved, then your verdict must be for the defendant.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Use this language when the plaintiff has more than one claim.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. This instruction assumes that the defendant had the responsibility to provide care for the plaintiff's serious medical needs. If the defendant has no duty, then a directed verdict would be appropriate. If the existence of the duty is disputed, the issue may be a question of law for the judge to decide. If a specific fact is disputed, which will be determinative of the defendant's responsibility, that fact should be submitted to the jury. For example, it may be disputed whether a certain person was working on a certain day. That question should be specifically submitted to the jury. The legal question whether a duty arises from a specific set of facts is a question for the judge.

5. In *Butler v. Fletcher*, 465 F.3d 340 (8th Cir. 2006), the court held that "deliberate indifference" is the appropriate standard of culpability for all claims that prison officials failed to provide pretrial detainees with adequate food, clothing, shelter, medical care and reasonable safety. It is probably best to define "deliberate indifference." *See Howard v. Adkison*, 887 F.2d 134 (8th Cir. 1989); *Duckworth v. Franzen*, 780 F.2d 645, 654 (7th Cir. 1985).

6. Add this phrase if it is alleged the medical care was provided but not at a reasonable time.

7. *Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988), suggests that actual damages are required in Eighth Amendment cases. *But see Carey v. Piphus*, 435 U.S. 247 (1978) and *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986), which stated that actual damages are not required in procedural due process cases. The Committee recommends requiring the jury to find that the plaintiff sustained damage in all Eighth Amendment cases. The measure of damages is addressed in Model Instructions 4.50A and 4.50B, *infra*. Nominal damages should be submitted in all Eighth Amendment cases, but must be defined in accordance with *Cowans* and Model Instruction 4.50B, *infra*. *See also* Committee Comments, Model Instruction 4.50A, *infra*.

8. Use this language if the issue of whether the defendant was acting under color of state law is still in the case. Color of state law will have to be defined. *See* 42 U.S.C. § 1983 and Model Instruction 4.40, *infra*.

Committee Comments

See infra Model Instruction 4.20 for a discussion of the standards to be applied when dealing with use of force on pretrial detainees. Medical claims of pretrial detainees are governed by the same "deliberate indifference" standard as used for convicted prisoners. *Butler v. Fletcher*, 465 F.3d 340 (8th Cir. 2006); *Davis v. Hall*, 992 F.2d 151 (8th Cir. 1993) is the controlling case. The "deliberate indifference" standard used in this instruction is an Eighth Amendment standard which is designed for use involving convicted persons. *See Wilson v. Seiter*, 501 U.S. 294 (1991); *Farmer v. Brennan*, 511 U.S. 825 (1994), but may also be used in pretrial detainee cases involving failure to provide food, clothing, shelter, medical care and reasonable safety. *Butler*, 465 F.3d at 345.

This instruction is derived from *Estelle v. Gamble*, 429 U.S. 97 (1976), which applies the Eighth Amendment to the United States Constitution to medical claims and sets the standards. *Wilson* did not change the standard, although it made it clearer that the deliberate indifference standard applies to all conditions of confinement cases of convicted persons and that negligence is not sufficient.

See Gobert and Cohen, *Rights of Prisoners* § 11.10.

The following definition of "serious medical need" should be considered:

> A serious medical need is one that has been diagnosed by a physician as requiring treatment or one that is so obvious that even

> a lay person would easily recognize the necessity for a doctor's attention.

Schaub v. VonWald, 638 F.3d 905, 914 (8th Cir. 2011). Whether an inmate's condition is a serious medical need is a question of fact. *Schaub* at 915. If a medical need would be obvious to a lay person, verifying medical evidence is unnecessary. *Id.* at 914.

"Deliberate indifference is equivalent to criminal-law recklessness, which is 'more blameworthy than negligence,' yet less blameworthy than purposefully causing or knowingly bringing about a substantial risk of serious harm to the inmate." *Id.* at 914-15. An official may be held liable if he knows that an inmate faces a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. *Id.* at 916. "The factual determination that an official had the requisite knowledge of a substantial risk may be inferred from circumstantial evidence, or from fact that risk was obvious." *Id.*

4.32 FAILURE TO PROTECT FROM ATTACK - SPECIFIC ATTACK - CONVICTED PRISONERS - EIGHTH AMENDMENT (And Pretrial Detainees - Fourteenth Amendment)

Your verdict must be for the plaintiff [and against defendant _____][1] [here generally describe the claim][2] if all the following elements have been proved[3]:

First, [here describe the attacker(s) such as "one or more [inmates]"] [here describe an act such as "struck, hit or kicked"][4] the plaintiff, and

Second, the defendant was aware of the substantial risk of an attack; and

Third, the defendant, with deliberate indifference to the plaintiff's need to be protected from [such attack], failed to protect the plaintiff; and

Fourth, as a direct result, the plaintiff was injured ,[5] and

[*Fifth*, the defendant was acting under color of state law.][6]

If any of the above elements has not been proved, then your verdict must be for the defendant.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Describe the claim if the plaintiff has more than one claim against this defendant.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. The conduct indicated by the plaintiff's evidence should be described generally.

5. Specific language which describes the damage the plaintiff suffered may be included here, and in the damage instruction, Model Instruction 4.50A, *infra*. The plaintiff must show that he suffered objectively serious harm as a result of the defendant's failure to protect. *Schoelch*, 625 F.3d at 1047.

6. Use this language if there is an issue as to whether the defendant was acting under color of state law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, this element will be conceded by the defendant. If so, it need not be included in this instruction. Color of state law will have to be defined on the factual issue specified if this paragraph is used. *See infra* Model Instruction 4.40.

Prisoner/Pretrial Detainee Civil Rights Cases

Committee Comments

"To prove unconstitutional failure to protect from harm (plaintiff) must show (1) an objectively sufficient deprivation, meaning that he was incarcerated under conditions posing a substantial risk of serious harm, and (2) that defendant was deliberately indifferent to the substantial risk of harm." *Schoelch* at 1046. Negligence is not sufficient. *See Ambrose v. Young*, 474 F.3d 1070, 1077 (8th Cir. 2007).

Although pretrial detainee claim is analyzed under the Fourteenth Amendment Due Process Clause rather than the Eighth Amendment, this makes little difference as a practical matter because pretrial detainees are entitled to (at least) the same protections under the Fourteenth Amendment as imprisoned convicts receive under the Eighth Amendment. *Schoelch v. Mitchell*, 625 F.3d 1041, 1046 (8th Cir. 2010); *Kahle v. Leonard*, 477 F.3d 544, 550 (8th Cir. 2007). *See also Morris v. Zefferi*, 601 F.3d 805 (8th Cir. 2010).

4.40 DEFINITION: COLOR OF STATE LAW (42 U.S.C. § 1983)

Acts are done under color of law when a person acts or [falsely appears] [falsely claims] [purports] to act in the performance of official duties under any state, county or municipal law, ordinance or regulation.

Committee Comments

See Monroe v. Pape, 365 U.S. 167 (1961), *overruled in part*, *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Screws v. United States*, 325 U.S. 91 (1945); *United States v. Classic*, 313 U.S. 299 (1941). See also *Neighborhood Enterprises, Inc. v. City of St. Louis*, 540 F.3d 882, 885 (8th Cir. 2008) (discussing definition as required in a § 1983 case). The court should, if possible, rule on the record whether the conduct of the defendant, if it occurred as claimed by the plaintiff, constitutes acting under color of state (county, municipal) law and should not instruct the jury on this issue. In most cases, the color of state law issue is not challenged and the jury need not be instructed on it. If it must be instructed, this instruction should normally be sufficient.

4.42 DEFINITION: PERVASIVE RISK OF HARM - CONVICTED PRISONERS (42 U.S.C. § 1983)

A pervasive risk of harm exists when (violent acts) (sexual assaults) occur with sufficient frequency that a prisoner or prisoners are put in reasonable fear for their safety, and prison officials are aware of the problem and the need for protective measures.

Committee Comments

In *Falls v. Nesbitt*, 966 F.2d 375 (8th Cir. 1992), the court stated:

> [A] "pervasive risk of harm" may not ordinarily be shown by pointing to a single incident or isolated incidents, but it may be established by much less than proof of a reign of violence and terror in the particular instruction. . . . It is enough that violence and sexual assaults occur . . . with sufficient frequency that prisoners . . . are put in reasonable fear for their safety and to reasonably apprise prison officials of the existence of the problem and the need for protective measures. . . .

Id. at 378 (quoting *Andrews v. Siegel*, 929 F.2d at 1330).

4.43 DEFINITION: SERIOUS MEDICAL NEED - CONVICTED PRISONERS (42 U.S.C. § 1983)

"A serious medical need is one that has been diagnosed by a physician as requiring treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention."[1]

Notes on Use

1. *Schaub v. VonWald*, 638 F.3d 905, 914 (8th Cir. 2011).

4.44 DEFINITION: DELIBERATE INDIFFERENCE - CONVICTED PRISONERS AND PRETRIAL DETAINEES (42 U.S.C. § 1983)

Deliberate indifference is established only if there is actual knowledge of a substantial risk that the plaintiff (describe serious medical problem or other serious harm that the defendant is expected to prevent) and if the defendant disregards that risk by intentionally refusing or intentionally failing to take reasonable measures to deal with the problem. Negligence or inadvertence does not constitute deliberate indifference.

Committee Comments

See Farmer v. Brennan, 511 U.S. 825 (1994) (clearly limiting deliberate indifference to intentional, knowing or recklessness in the criminal law context which requires actual knowledge of a serious risk). *Wilson v. Seiter*, 501 U.S. 294 (1991). The court is limiting Eighth Amendment claims to those in which the plaintiff can show actual subjective intent rather than just recklessness in the tort sense. In *Wilson*, the court characterized as Eighth Amendment violations only acts which are "*deliberate* act[s] *intended* to chastise or deter" (emphasis added) or "punishment [which] has been deliberately administered for a penal or disciplinary *purpose*" (emphasis added). *Wilson*, 501 U.S. at 300. The court, continuing to follow the deliberate indifference standard, clearly stated that negligence was not sufficient.

See also *Schaub v. VonWald*, 638 F.3d 905 (8th Cir. 2011). The *Schaub* case discusses standards to be applied to inmates' claims of deliberate indifference to medical needs. *See supra* Model Instruction 4.31.

In *Butler v. Fletcher*, 465 F.3d 340, 345 (8th Cir. 2006), the court, in discussing the right to food, clothing, shelter, medical care and reasonable safety, stated that "[p]retrial detainees and convicted inmates, like all persons in custody, have the same right to these basic needs. Thus, the same standard of care is appropriate." The court then held that the deliberate indifference standard is the standard to be applied.

The Committee believes the phrase "deliberate indifference" should be defined in most cases, although Eighth Circuit case law does not require it.

4.45 DEFINITION: MALICIOUSLY

"Maliciously" means intentionally injuring another without just cause.

Committee Comments

See Howard v. Barnett, 21 F.3d 868 (8th Cir. 1994). See also *Black's Law Dictionary* (9th ed. 2009) ("Substantially certain to cause injury. Without just cause or excuse.")

4.46 DEFINITION: SADISTICALLY

"Sadistically" means engaging in "extreme or excessive cruelty or delighting in cruelty."

Committee Comments

See Howard v. Barnett, 21 F.3d 868 (8th Cir. 1994).

Prisoner/Pretrial Detainee Civil Rights Cases

4.50A ACTUAL DAMAGES - PRISONER CIVIL RIGHTS

If you find in favor of the plaintiff, you must award [him] [her] an amount of money that will fairly compensate [him] [her] for [any damages][1] you find [he] [she] sustained [and is reasonably certain to sustain in the future][2] as a direct result of [insert appropriate language such as "the conduct of the defendant as submitted in Instruction _____" or "the failure to provide the plaintiff with medical care" or "the violation of the plaintiff's constitutional rights."][3] [You should consider the following elements of damages:

1. The physical pain and (mental) (emotional) suffering the plaintiff has experienced (and is reasonably certain to experience in the future); the nature and extent of the injury, whether the injury is temporary or permanent (and whether any resulting disability is partial or total) (and any aggravation of a pre-existing condition);

2. The reasonable value of the medical (hospital, nursing, and similar) care and supplies reasonably needed by and actually provided to the plaintiff (and reasonably certain to be needed and provided in the future);

3. The (wages, salary, profits, reasonable value of the working time) the plaintiff has lost [and the reasonable value of the earning capacity the plaintiff is reasonably certain to lose in the future] because of [(his) (her)] [(inability) (diminished ability)] to work.]

[Remember, throughout your deliberations you must not engage in speculation, guess, or conjecture, and you must not award any damages under this Instruction by way of punishment or through sympathy.]

Notes on Use

1. A summary of the specific types of damage or injuries which are supported by the evidence can be described here in lieu of the phrase "any damages."

2. Use this language if permanent injuries are involved.

3. It is important to use language that limits the damages recovered to those attributable to the improper conduct of the defendant. *See Memphis Community Dist. v. Stachura*, 477 U.S. 299, 309-10 (1986).

Prisoner/Pretrial Detainee Civil Rights Cases

Committee Comments

Damages that may be recovered under 42 U.S.C. § 1983, are : actual or compensatory, nominal and punitive. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986). Actual or compensatory damages are to "compensate persons for injuries that are caused by the deprivation of constitutional rights," and not "undefinable value of infringed right" or "presumed" damages. *Id.* at 307 and 309. *See also Corpus v. Bennett*, 430 F.3d 912, 916 (8th Cir. 2005); *Carey v. Piphus*, 435 U.S. 247 (1978). Actual damages include compensation for out-of-pocket loss, other monetary losses and for impairment of reputation, personal humiliation, mental anguish and suffering. *Memphis Community School Dist. v. Stachura*.

Cowans v. Wyrick, 862 F.2d 697 (8th Cir. 1988), suggests that actual damages are required in Eighth Amendment cases. *But see Carey v. Piphus*, 435 U.S. 247 (1978) and *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986), which stated that actual damages are not required in procedural due process cases. The Committee recommends requiring the jury to find that the plaintiff sustained damage in all Eighth Amendment cases. The measure of damages is also addressed in Model Instruction 4.50A, *infra*. Nominal damages should be submitted in all Eighth Amendment cases, but must be defined in accordance with *Cowans* and Model Instruction 4.50B, *infra*.

Prisoner/Pretrial Detainee Civil Rights Cases

4.50B NOMINAL DAMAGES - PRISONER CIVIL RIGHTS

If you find in favor of the plaintiff under Instruction _____,[1] but you find that the plaintiff's damages have no monetary value,[2] then you must return a verdict for the plaintiff in the nominal amount of One Dollar ($1.00).[3]

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. *Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988), a prisoner civil rights case, used the language "unable to place a monetary value" on the plaintiff's damages as the proper standard for when nominal damages are appropriate. That language may mislead a jury to believe that nominal damages should be awarded if they are having a difficult time agreeing upon or deciding the amount which should be awarded to compensate for such elements of damage as suffering, humiliation, pain, etc. See also *Corpus v. Bennett*, 430 F.3d 912, 916 (8th Cir. 2005) (where jury found no direct injury, nominal damages were appropriate means to vindicate constitutional rights whose deprivation had not caused an actual provable injury).

3. One Dollar ($1.00) is arguably the required amount in cases in which nominal damages are appropriate. Nominal damages may be appropriate when the jury is unable to place a monetary value on the harm that the plaintiff suffered from the violation of his rights. *Cf. Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) (in prisoner civil rights action, nominal damages are appropriate where the jury cannot place a monetary value on the harm suffered by the plaintiff); *Haley v. Wyrick*, 740 F.2d 12 (8th Cir. 1984). *See* Committee Comments.

Committee Comments

This instruction is derived from Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 128.82 (5th ed. 2000). It has been modified slightly.

In certain cases, nominal damages may be recovered when there is a violation of constitutional rights. *See Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986); *Carey v. Piphus*, 435 U.S. 247 (1978); *Tatum v. Houser*, 642 F.2d 253 (8th Cir. 1981); *Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988). *Carey* discusses the amount of nominal damages at page 267.

The Committee recommends requiring the jury to find that the plaintiff suffered damage in most cases, unless it is clear that recovery is permitted without a showing of any damage or injury. *See Memphis* and *Carey*. In classic Eighth Amendment cases, damages must be established and the elements instruction should require the jury to find that the plaintiff sustained damage. However, nominal damages must still be submitted in Eighth Amendment cases if requested. The definition contained in this instruction is the one that should be used.

Prisoner/Pretrial Detainee Civil Rights Cases

4.50C PUNITIVE DAMAGES - CIVIL RIGHTS

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award punitive damages.

If you find in favor of the plaintiff under Instruction(s) _____ and if it has been proved [1] that the conduct of that defendant as submitted in Instruction _____[2] was malicious or recklessly indifferent to the plaintiff's (specify, *e.g.*, medical needs),[3] then you may, but are not required to, award the plaintiff an additional amount of money as punitive damages for the purposes of punishing the defendant for engaging in misconduct and [deterring] [discouraging] the defendant and others from engaging in similar misconduct in the future. You should presume that a plaintiff has been made whole for [his, her, its] injuries by the damages awarded under Instruction _____.[4]

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. How reprehensible the defendant's conduct was.[5] In this regard, you may consider [whether the harm suffered by the plaintiff was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether the defendant's conduct that harmed the plaintiff also posed a risk of harm to others; whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed the plaintiff].[6]

2. How much harm the defendant's wrongful conduct caused the plaintiff [and could cause the plaintiff in the future].[7] [You may not consider harm to others in deciding the amount of punitive damages to award.][8]

3. What amount of punitive damages, in addition to the other damages already awarded, is needed, considering the defendant's financial condition, to punish the defendant for [his, her, its] wrongful conduct toward the plaintiff and to [deter] [discourage] the defendant and others from similar wrongful conduct in the future.

4. [The amount of fines and civil penalties applicable to similar conduct].[9]

Prisoner/Pretrial Detainee Civil Rights Cases

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to the plaintiff.[10]

[You may [assess] [award] punitive damages against any or all defendants or you may refuse to [impose] [award] punitive damages. If punitive damages are [assessed] [awarded] against more than one defendant, the amounts [assessed] [awarded] against those defendants may be the same or they may be different.][11]

[You may not award punitive damages against the defendant[s] for conduct in other states.][12]

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Use if more than one element instruction.

3. Punitive damages are allowed even though the threshold for liability requires reckless conduct. If the threshold for the underlying tort liability is less than "reckless," the bracketed language correctly states the standard for punitive damages under 42 U.S.C. § 1983. *Smith v. Wade*, 461 U.S. 30 (1983) (punitive damages may be awarded "when the defendant's conduct involves reckless or callous indifference to the plaintiff's federally protected rights, as well as when it is motivated by evil motive or intent."). *See Schaub v. VonWald*, 638 F.3d 905, 922-24 (8th Cir. 2011) (the threshold inquiry for award of punitive damages is whether the evidence supports that the conduct involved was reckless or callous indifference). *See also Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535, 536 (1999), and *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 903 (8th Cir. 2006), discussing the meaning of "malice" and "reckless indifference." If the threshold for liability is "malice" or "reckless indifference" or something more culpable, no additional finding should be necessary because the language in the issue/element instruction requires the jury to find the culpability necessary for imposing punitive damages. However, it is recommended that the punitive damages instruction include such language to be sure the jury focuses on that issue.

4. Fill in the number or title of the actual damages or nominal damages instruction here.

5. The word "reprehensible" is used in the same sense as it is used in common parlance. The Supreme Court, in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003), stated: "It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." In *Philip Morris USA v. Williams*, 549 U.S. 346, 355, 127 S. Ct. 1057, 1064-65 (2007), the Supreme Court held that, while harm to persons

other than the plaintiff may be considered in determining reprehensibility, a jury may not punish for the harm caused to persons other than the plaintiff. The Court stated that procedures were necessary to assure "that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* at 355.

6. Any item not supported by the evidence, of course, should be excluded.

7. This sentence may be used if there is evidence of future harm to the plaintiff.

8. A paragraph instructing the jury that any punitive damages award should not include an amount for harm suffered by persons who are not parties to the case may be necessary if evidence concerning harm suffered by nonparties has been introduced. *See Philip Morris USA v. Williams*, 549 U.S. at 355; *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 422-24 (2003); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004).

9. Insert this phrase only if evidence has been introduced, or the court has taken judicial notice, of fines and penalties for similar conduct. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996), noting "civil penalties authorized in comparable cases" as a guidepost to be considered. *See also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003).

10. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (stating that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" and observing that: "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to1 [citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996)] or, in this case, of 145 to 1.").

11. The bracketed language is available for use if punitive damages claims are submitted against more than one defendant.

12. If evidence has been introduced concerning conduct by the defendant that was legal in the state where it was committed, the jury must be told that they cannot award punitive damages against the defendant for such conduct. *See State Farm Mut. Auto. Inc. Co. v. Campbell*, 538 U.S. 408, 422 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572-73 (1996); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004). This issue normally will not come up in cases under federal law. In any case in which evidence is admitted for some purposes but may not be considered by the jury in awarding punitive damages, the court should give an appropriate limiting instruction.

Committee Comments

This instruction attempts to incorporate the constitutionally relevant principles set forth by the Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459-62 (1993). In *State Farm*, 538 U.S. at 417, the Court observed: "We have admonished that '[p]unitive damages pose an acute danger of

arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.'" (quoting *Honda Motor*, 512 U.S. at 432). *See Baker v. John Morrell & Co.*, 266 F. Supp. 2d 909, 961 (N.D. Iowa 2003), *aff'd*, 382 F.3d 816 (8th Cir. 2004), and *In Re Exxon Valdez*, 296 F. Supp. 2d 1071, 1080 (D. Alaska 2004), for examples of punitive damages instructions in which the court attempted to incorporate constitutional standards.

The last paragraph is based on *State Farm*, 538 U.S. at 421, in which the Court held that: "A state cannot punish a defendant for conduct that may have been lawful where it occurred. . . . Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." The Court specifically mandated that: "A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm*, 538 U.S. at 422.

4.60 VERDICT FORM - ONE PLAINTIFF, TWO DEFENDANTS, ONE INJURY CASE

VERDICT

Note: Complete this form by writing in the names required by your verdict.

On plaintiff (name)'s claim against defendant (name), as submitted in Instruction No. _____, we find in favor of

_____

(Plaintiff (name)) or (Defendant (name))

On plaintiff (name)'s claim against defendant (name), as submitted in Instruction No. _____, we find in favor of

_____

(Plaintiff (name)) or (Defendant (name))

Note: Complete the following paragraphs only if one or more of the above findings is in favor of the plaintiff.

We find plaintiff (name)'s damages to be:

$_____ (state the amount or, if none, write the word "none")[1] (stating the amount, or if you find that the plaintiff's damages have no monetary value, state the nominal amount of $1.00).[2]

Note: You may not award punitive damages against any defendant unless you have first found against that defendant and awarded the plaintiff nominal or actual damages.

We assess punitive damages against defendant (name) as follows:

$_____ (state the amount or, if none, write the word "none").

We assess punitive damages against defendant (name of other defendant) as follows:

$_____ (state the amount or, if none, write the word "none").

_____
Foreperson

Dated: _____

Notes on Use

1. Use this phrase if the jury has not been instructed on nominal damages.
2. Include this paragraph if the jury has been instructed on nominal damages.

5. EMPLOYMENT CASES

Overview

Section 5 contains model instructions for employment discrimination, retaliation, and harassment cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*; 42 U.S.C. § 1981; 42 U.S.C. § 1983; the Equal Pay Act, 29 U.S.C. § 206(d); the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*; and the Family Medical Leave Act (FMLA), 29 U.S.C. § 2601, *et seq.* It bears emphasis that these are *model* instructions and that the instructions for a particular case must be tailored to the facts and issues presented. This caveat applies to issues such as damages and affirmative defenses, and it applies most importantly to the identification of the proper standard for liability under the specific statute in question.

Background

When this project commenced in 1987, jury trials were not available in Title VII cases, the ADA and FMLA did not exist, and the standard for liability in ADEA cases was whether the plaintiff's age was a "determining factor" in the challenged employment decision. *E.g., Grebin v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 779 F.2d 18, 20 n.1 (8th Cir. 1985). Over the years, a number of developments have changed the legal landscape, including:

1. The United States Supreme Court's distinction between "direct evidence" and "pretext" cases in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and the corresponding burden-shifting approach in "direct evidence" cases;
2. The passage of the ADA, the Civil Rights Act of 1991, and the FMLA;
3. The Supreme Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), which ruled that the standard for liability in Title VII discrimination cases under 42 U.S.C. § 2000e-2(m) is whether the plaintiff's protected status was a "motivating factor" in the challenged employment decision, regardless of whether the plaintiff is relying on direct or circumstantial evidence;
4. The Supreme Court's decision in *Gross v. FBL Financial Services ,Inc.* 557 U.S. 167, 129 S. Ct. 2343 (2009), which ruled that mixed-motive instructions are never proper in ADEA cases and that the standard for liability in ADEA cases is

whether the plaintiff's age was a "but-for" cause of the challenged employment decision.

In light of *Costa* and *Gross*, the standards for liability in ADEA and Title VII discrimination cases are clear. However, in cases arising under other statutes – such as 42 U.S.C. § 1981, 42 U.S.C. § 1983, and the anti-retaliation provision of Title VII (42 U.S.C. § 2000e-3(a)) – the direct evidence/pretext distinction may still be viable. In turn, the decision whether to use a "determining factor" instruction (which places the burden on the plaintiff to show "but for" causation) or a "motivating factor/same decision" instruction (which places the burden on the defendant to show that it would have made the "same decision" regardless of the plaintiff's protected status) will be important because of the potentially dispositive difference in the burden of persuasion. Accordingly, trial courts and lawyers should be careful to consider the correct approach depending on the particular facts of the case and the statute(s) at issue.

Recommended Approach

A. Following *Gross*, the "but-for" instructional format should be used in all ADEA cases. *See* Model Instruction 5.11.

B. Following *Costa*, a motivating factor/same decision format should be used in all Title VII *discrimination* cases brought under 42 U.S.C. § 2000e-2(m). *See* Model Instructions 5.01, 5.01A.

C. Following the Eighth Circuit's decision in *Pedigo v. P.A.M. Transport, Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995), the motivating factor/same decision format is recommended for discrimination cases arising under the Americans with Disabilities Act. *See* Model Instructions 5.50 *et seq.*

D. Following the Eighth Circuit's decision in *Prejean v. Warren*, 301 F.3d 893, 900-01 (8th Cir. 2002), the motivating factor/same decision format is recommended for Title VII retaliation cases. *See* Model Instructions 5.60 *et seq.*

E. Following *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977), the motivating factor/same decision format is recommended for First Amendment retaliation cases. *See* Model Instructions 5.70 *et seq.*

Employment Cases

F. With respect to other federal employment statutes – such as 42 U.S.C. § 1981 (*see* Model Instructions 5.20 *et seq.*); 42 U.S.C. § 1983 (*see* Model Instructions 5.25 *et seq.*); and FMLA cases (*see* Model Instructions 5.80 *et seq.*) – the trial court should seek agreement between the parties as to which format to use and, if the parties are unable to agree, the trial court can cover all bases by eliciting findings under the "determining factor" *and* "motivating factor/same decision" standards with the set of special interrogatories set forth at Model Instruction 5.92. *See Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1059-60 (8th Cir. 2002) (approving use of 5.92 special interrogatories).

Employment Cases - Title VII

5.01 TITLE VII - ELEMENTS

Your verdict must be for the plaintiff [and against defendant _____][1] [on the plaintiff's (sex)[2] discrimination claim][3] if all the following elements have been proved[4]:

First, the defendant [discharged][5] the plaintiff; and

Second, the plaintiff's (sex) [was a motivating factor][6] [played a part][7] in the defendant's decision.

If either of the above elements has not been proved, your verdict must be for the defendant and you need not proceed further in considering this claim. [You may find that the plaintiff's (sex) [was a motivating factor] [played a part] in the defendant's (decision)[8] if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide (sex) discrimination.][9]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. This instruction is designed for use in a gender discrimination case. It must be modified if the plaintiff is claiming discrimination on the basis of race, religion, or some other prohibited factor.

3. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

4. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

5. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

6. The Committee believes that the phrase "motivating factor" should be defined. *See infra* Model Instruction 5.96. It appears to be an open question after *Costa* whether a plaintiff may chose to submit under section 2000e2(a)(1) using the determining factor/*McDonnell Douglas* format. Those instructions may be found at Model Instructions 5.10 *et seq.*

7. *See infra* Model Instruction 5.96, which defines "motivating factor" in terms of whether the characteristic "played a part or a role" in the defendant's decision. The phrase "motivating factor" need not be defined if the definition itself is used in the element instruction.

8. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct" --would be more appropriate.

9. This sentence may be added, if appropriate. *See* Model Instruction 5.95, *infra*, and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

This instruction is designed to submit the issue of liability in "disparate treatment" Title VII cases that are subject to the amendments set forth in the Civil Rights Act of 1991. Prior to these amendments, Title VII cases were not jury-triable, *Harmon v. May Broadcasting Co.*, 583 F.2d 410 (8th Cir. 1978), and the liability standards depended upon whether the case was classified as a "pretext" case or a "mixed motive" case. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Under the Civil Rights Act of 1991, these cases will be triable to a jury, *see* CRA of 91, § 102 (codified at 42 U.S.C. § 1981a(c) (1994)), and, more importantly, the plaintiff prevails on the issue of liability if he or she shows that discrimination was a "motivating factor" in the challenged employment decision. *See* CRA of 91, § 107 (codified at 42 U.S.C. § 2000e-2(m) (1994) (pretext cases)). Plaintiffs who prevail on the issue of liability will be eligible for a declaratory judgment and attorney fees; however, they cannot recover actual or punitive damages if the defendant shows that it would have made the same employment decision irrespective of any discriminatory motivation. *See* CRA of 91, § 107 (codified at 42 U.S.C. § 2000e-5(g)(2)(B) (1994)); *see infra* Model Instruction 5.01A ("same decision" instruction).

It is unnecessary and inadvisable to instruct the jury regarding the three-step analysis of *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). *See Grebin v. Sioux Falls Indep. School Dist. No. 49-5*, 779 F.2d 18, 20-21 (8th Cir. 1985) (ADEA case). *See generally Gilkerson v. Toastmaster, Inc.*, 770 F.2d 133, 135 (8th Cir. 1985) (after all of the evidence has been presented, inquiry should focus on ultimate issue of intentional discrimination, not on any particular step in the *McDonnell Douglas* paradigm). Accordingly, this instruction is focused on the ultimate issue of whether the plaintiff's protected characteristic was a "motivating factor" in the defendant's employment decision.

Employment Cases - Title VII

5.01A TITLE VII - "SAME DECISION"

If you find in favor of the plaintiff under Instruction ____,[1] then you must answer the following question in the verdict form[s]: Has it been proved[2] that the defendant [would have discharged][3] the plaintiff regardless of [(his) (her)] [sex][4]?

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote" or "demotion" case, the language within the brackets must be modified.

4. This instruction is designed for use in a gender discrimination case. The language within the brackets must be modified if other forms of discrimination are alleged. The practical effect of a decision in favor of the plaintiff under Model Instruction 5.01, *supra*, but in favor of the defendant on this question under Title VII, is a judgment for the plaintiff and eligibility for an award of attorney fees but no actual damages. The Committee takes no position on whether the judge should advise the jury or allow the attorneys to argue to the jury the effect of a decision in favor of the defendant on the question set out in this instruction.

Committee Comments

If a plaintiff prevails on the issue of liability by showing that discrimination was a "motivating factor," the defendant nevertheless may avoid an award of damages or reinstatement by showing that it would have taken the same action "in the absence of the impermissible motivating factor." *See* CRA of 91, § 107 (codified at 42 U.S.C. § 2000e-5(g)(2)(B) (1994)). This instruction is designed to submit this "same decision" issue to the jury.

5.02A TITLE VII - ACTUAL DAMAGES

If you find in favor of the plaintiff under Instruction ____[1] and if you answer "no" in response to Instruction ____[2], then you must award the plaintiff such sum as you find will fairly and justly compensate the plaintiff for any damages you find the plaintiff sustained as a direct result of [describe the defendant's decision - *e.g.*, "the defendant's decision to discharge the plaintiff"]. The plaintiff's claim for damages includes three distinct types of damages and you must consider them separately:

First, you must determine the amount of any wages and fringe benefits[3] the plaintiff would have earned in [(his) (her)] employment with the defendant if [(he) (she)] had not been discharged on [fill in date of discharge] through the date of your verdict,[4, 5, 6] *minus* the amount of earnings and benefits that the plaintiff received from other employment during that time.

Second, you must determine the amount of any other damages sustained by the plaintiff, such as [list damages supported by the evidence].[7] You must enter separate amounts for each type of damages in the verdict form and must not include the same items in more than one category.

[You are also instructed that the plaintiff has a duty under the law to "mitigate" [(his) (her)] damages - that is, to exercise reasonable diligence under the circumstances to minimize [(his) (her)] damages. Therefore, if you find that the plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [(him) (her)], you must reduce [(his) (her)] damages by the amount [(he) (she)] reasonably could have avoided if [(he) (she)] had sought out or taken advantage of such an opportunity.][8]

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.][9]

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Fill in the number or title of the "same decision" instruction here.

3. When certain benefits, such as employer-subsidized health insurance, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which

recovery for those benefits is to be calculated. Claims for lost benefits often present difficult issues as to the proper measure of recovery. *See Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 470 (8th Cir. 1989) (discussing different approaches). Some courts deny recovery for lost benefits unless the employee purchased substitute coverage, in which case the measure of damages is the employee's out-of-pocket expenses. *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 161-62 (7th Cir. 1981); *Pearce v. Carrier Corp.*, 966 F.2d 958 (5th Cir. 1992). Other courts permit the recovery of the amount the employer would have paid as premiums on the employee's behalf. *See Fariss v. Lynchburg Foundry*, 769 F.2d 958, 964-65 (4th Cir. 1985). The Committee expresses no view as to which approach is proper. This instruction also may be modified to exclude certain items which were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.

4. In some cases, the defendant will assert some independent post-discharge reason - such as a plant closing or sweeping reduction in force - as to why the plaintiff would have been terminated in any event before trial. *See*, *e.g.*, *Cleverly v. Western Elec. Co.*, 450 F. Supp. 507, 511 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979). In those cases, this instruction must be modified to submit this issue for the jury's determination.

5. The trial court may decide to set a time limit beyond which an award of future damages would be impermissibly speculative. *See Hybert v. Hearst Corp.*, 900 F.2d 1050, 1056-57 (7th Cir. 1990); *Snow v. Pillsbury Co.*, 650 F. Supp. 299, 300-01 (D. Minn. 1986) (ADEA case in which front pay was limited to three years); *see also Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1062 (8th Cir. 1988) (district court awarded front pay in lieu of reinstatement; the amount of front pay awarded was determined by the district court and was nearly identical to amount of back pay). *But cf. Neufeld v. Searle Lab.*, 884 F.2d 335, 341 (8th Cir. 1989) (in age discrimination cases, if reinstatement is deemed by the court in its equitable powers to be inappropriate, the plaintiff is presumptively entitled to front pay through normal retirement age unless employer proves evidence to the contrary).

6. Front pay is essentially an equitable remedy "in lieu of" reinstatement and is an issue for the court, not the jury. *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999). If the issue of front pay is submitted to the jury, the jury's determination may be binding. *See Doyne v. Union Elec. Co.*, 953 F.2d 447, 451 (8th Cir. 1992). If front pay is awarded, it should be excluded from the statutory limit on compensatory damages provided for in 42 U.S.C. § 1981a(b)(3). *See Kramer v. Logan County Sch. Dist. No. R-1*, 157 F.3d 620, 625-26 (8th Cir. 1998).

7. Under the 1991 amendments to Title VII, a prevailing plaintiff may recover damages for mental anguish and other personal injuries. The types of damages mentioned in § 102 of the Civil Rights Act of 1991 include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." CRA of 91, § 102 (codified at 42 U.S.C. § 1981a(b)(3) (1994)).

8. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983); *Fieldler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808-09 (8th Cir. 1982).

9. This paragraph may be given at the trial court's discretion.

Committee Comments

The Civil Rights Act of 1991 makes three significant changes in the law regarding the recovery of damages in Title VII cases. First, the plaintiff prevails on the issue of liability by showing that unlawful discrimination was a "motivating factor" in the relevant employment decision; however, the plaintiff cannot recover any actual damages if the employer shows that it would have made the same employment decision even in the absence of any discriminatory intent. *See* CRA of 91, § 107 (codified at 42 U.S.C. § 2000e-2(g)(2)(B) (1994)). Second, the Civil Rights Act permits the plaintiff to recover general compensatory damages in addition to the traditional employment discrimination remedy of back pay and lost benefits. *See* CRA of 91, § 102 (codified at 42 U.S.C. § 1981a(a) (1994)). Third, the Act expressly limits the recovery of general compensatory damages to certain dollar amounts, ranging from $50,000 to $300,000 depending upon the size of the employer. *See* CRA of 91, § 102 (codified at 42 U.S.C. § 1981a(b) (1994)).

This instruction is designed to submit the standard back pay formula of lost wages and benefits reduced by interim earnings and benefits. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808-09 (8th Cir. 1982). This instruction may be modified to articulate the types of interim earnings which should be offset against the plaintiff's back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See Krause v. Dresser Indus.*, 910 F.2d 674, 680 (10th Cir. 1990); *Cornetta v. United States*, 851 F.2d 1372, 1381 (Fed. Cir. 1988); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). Unemployment compensation, Social Security benefits, and pension benefits ordinarily are not offset against a back pay award. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451-52 (8th Cir. 1992) (holding that pension benefits are a "collateral source benefit"); *Dreyer v. Arco Chem. Co.*, 801 F.2d 651, 653 n.1 (3d Cir. 1986) (Social Security and pension benefits not deductible); *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 138-39 (3d Cir. 1986) (unemployment benefits not deductible), *overruled on other grounds by Hazen Paper Co. v. Biggins*, 507 U.S. 604, 615 (1993); *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 626-27 (6th Cir. 1983) (same). *But cf. Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of unemployment compensation is within trial court's discretion); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976) (same). However, because Title VII, as amended by the Civil Rights Act of 1991, no longer limits recovery of damages, the instruction permits the recovery of general damages for pain, suffering, humiliation, and the like.

Because the law imposes a limit on general compensatory damages but does not limit the recovery of back pay and lost benefits, the Committee believes that these types of damages must be considered and assessed separately by the jury. Otherwise, if the jury awarded a single dollar amount, it would be impossible to identify the portion of the award that was attributable to back pay and the portion that was attributable to "general damages." As a result, the trial court would not be able to determine whether the jury's award exceeded the statutory limit.

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy "in lieu of" reinstatement, this remedy traditionally has been viewed as an issue for the court, not the jury. *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999). *See MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054, 1060 (8th Cir. 1988); *Newhouse v. McCormick & Co.*, 110 F.3d 635, 641 (8th Cir. 1997). If the trial court submits the issue of front pay to the jury, the jury's determination may be binding. *See Doyne v. Union Elec. Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (ADEA case).

In *Kramer v. Logan County Sch. Dist. No. R-1*, 157 F.3d 620 (8th Cir. 1998), the court ruled that "front pay is an equitable remedy excluded from the statutory limit on compensatory damages provided for in [42 U.S.C.] § 1981a(b)(3)." *Id.* at 626.

Although the Civil Rights Act of 1991 expressly limits the amount of compensatory and punitive damages depending upon the size of the employer, section 102 of the Act expressly states that the jury shall not be advised on any such limitation. Instead, the trial court will simply reduce the verdict by the amount of any excess.

Employment Cases - Title VII

5.02B TITLE VII - NOMINAL DAMAGES

If you find in favor of the plaintiff under Instruction ____[1] and if you answer "no" in response to Instruction ____[2], but you find that the plaintiff's damages have no monetary value, then you must return a verdict for the plaintiff in the nominal amount of One Dollar ($1.00).[3]

Notes on Use

1. Fill in the number or title of the essential elements instruction (5.01) here.

2. Fill in the number or title of the "same decision" instruction (5.01A) here.

3. One Dollar ($1.00) arguably is the required amount in cases in which nominal damages are appropriate. Nominal damages are appropriate when the jury is unable to place a monetary value on the harm that the plaintiff suffered from the violation of his rights. *See Dean v. Civiletti*, 670 F.2d 99, 101 (8th Cir. 1982) (Title VII); *cf. Cowans v. Wyrick*, 862 F.2d 697-99 (8th Cir. 1988) (in prisoner civil rights action, nominal damages are appropriate where the jury cannot place a monetary value on the harm suffered by the plaintiff); *Haley v. Wyrick*, 740 F.2d 12 (8th Cir. 1984).

Committee Comments

Most employment discrimination cases involve lost wages and benefits. In some cases, however, the jury may be permitted to return a verdict for only nominal damages. For example, if the plaintiff was given severance pay and was able to secure a better paying job, the evidence may not support an award of back pay, but may support an award of compensatory damages. Similarly, in a sexual harassment case in which the plaintiff does not suffer any lost wages or benefits, the jury may find for the plaintiff but award no actual damages. This instruction is designed to submit the issue of nominal damages in appropriate cases.

Employment Cases - Title VII

5.02C TITLE VII - PUNITIVE DAMAGES

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award punitive damages.

If you find in favor of the plaintiff under Instruction(s) _____,[1] and if you answer "no" in response to Instruction _____,[2] then you must decide whether the defendant acted with malice or reckless indifference to the plaintiff's right not to be discriminated against[3] on the basis of [(his) (her)] (sex).[4] The defendant acted with malice or reckless indifference if:

> it has been proved[5] that [insert the name(s) of the defendant or manager[6] who terminated[6] the plaintiff] knew that the (termination)[7] was in violation of the law prohibiting (sex) discrimination, or acted with reckless disregard of that law.[8]

[However, you may not award punitive damages if it has been proved that the defendant made a good-faith effort to comply with the law prohibiting (sex)[4] discrimination][9].

If you find that the defendant acted with malice or reckless indifference to the plaintiff's rights [and did not make a good-faith effort to comply with the law], then, in addition to any other damages to which you find the plaintiff entitled, you may, but are not required to, award the plaintiff an additional amount as punitive damages for the purposes of punishing the defendant for engaging in such misconduct and deterring the defendant and others from engaging in such misconduct in the future. You should presume that a plaintiff has been made whole for [his, her, its] injuries by the damages awarded under Instruction ____.[10]

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. How reprehensible the defendant's conduct was.[11] In this regard, you may consider [whether the harm suffered by the plaintiff was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether the defendant's conduct that harmed the plaintiff also posed a risk of harm to others; whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed the plaintiff].[12]

2. How much harm the defendant's wrongful conduct caused the plaintiff [and could cause the plaintiff in the future].[13] [You may not consider harm to others in deciding the amount of punitive damages to award.][14]

3. What amount of punitive damages, in addition to the other damages already awarded, is needed, considering the defendant's financial condition, to punish the defendant for [his, her, its] wrongful conduct toward the plaintiff and to deter the defendant and others from similar wrongful conduct in the future.

4. [The amount of fines and civil penalties applicable to similar conduct].[15]

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to the plaintiff.[16]

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.][17]

[You may not award punitive damages against the defendant[s] for conduct in other states.][18]

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Fill in the number or title of the "same decision" instruction if applicable.

3. Although a finding of discrimination ordinarily subsumes a finding of intentional misconduct, this language is included to emphasize the threshold for recovery of punitive damages. Under the Civil Rights Act of 1991, the standard for punitive damages is whether the defendant acted "with malice or with reckless indifference to the [plaintiff's] federally protected rights." CRA of 91, § 102 (codified at 42 U.S.C. § 1981a(b)(1)).

4. This instruction is designed for use in a gender discrimination case. It must be modified if other forms of discrimination are alleged.

5. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

6. Use the name of the defendant, the manager who took the action, or other descriptive phrase such as "the manager who fired the plaintiff."

7. This language is designed for use in a discharge case. In a "failure to hire," "failure to promote," "demotion," or "constructive discharge" case, the language must be modified.

8. *See Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535, 536 (1999) (holding that "'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination" and that "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages"); *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 903 (citing *Kolstad* and observing that an award of punitive damages may be inappropriate when the underlying theory of discrimination is novel or poorly recognized or "when the employer (1) is unaware federal law prohibits the relevant conduct, (2) believes the discriminatory conduct is lawful, or (3) reasonably believes there is a bona fide occupational qualification defense for the discriminatory conduct").

9. Use this phrase only if the good faith of the defendant is to be presented to the jury. This two-part test was articulated by the United States Supreme Court in *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999). For a discussion of the case, see the Committee Comments. It is not clear from the case who bears the risk of nonpersuasion on the good-faith issue. The Committee predicts that case law will place the burden on the defendant to raise the issue and prove it.

10. Fill in the number or title of the actual damages or nominal damages instruction here.

11. The word "reprehensible" is used in the same sense as it is used in common parlance. The Supreme Court, in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003), stated: "It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." In *Philip Morris USA v. Williams*, 549 U.S. 346, 355, 127 S. Ct. 1057, 1064-65 (2007), the Supreme Court held that, while harm to persons other than the plaintiff may be considered in determining reprehensibility, a jury may not punish for the harm caused to persons other than the plaintiff. The Court stated that procedures were necessary to assure "that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* at 355.

12. Any item not supported by the evidence, of course, should be excluded.

13. This sentence may be used if there is evidence of future harm to the plaintiff.

14. A paragraph instructing the jury that any punitive damages award should not include an amount for harm suffered by persons who are not parties to the case may be necessary if evidence concerning harm suffered by nonparties has been introduced. *See Philip Morris USA v. Williams*, 549 U.S. at 355; *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 422-24 (2003); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004).

15. Insert this phrase only if evidence has been introduced, or the court has taken judicial notice, of fines and penalties for similar conduct. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996), noting "civil penalties authorized in comparable cases" as a guidepost to be considered. *See also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003).

16. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (stating that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" and observing that: "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to1 [citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996)] or, in this case, of 145 to 1.").

17. The bracketed language is available for use if punitive damages claims are submitted against more than one defendant.

18. If evidence has been introduced concerning conduct by the defendant that was legal in the state where it was committed, the jury must be told that they cannot award punitive damages against the defendant for such conduct. *See State Farm Mut. Auto. Inc. Co. v. Campbell*, 538 U.S. 408, 422 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572-73 (1996); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004). This issue normally will not come up in cases under federal law. In any case in which evidence is admitted for some purposes but may not be considered by the jury in awarding punitive damages, the court should give an appropriate limiting instruction.

Committee Comments

Under the Civil Rights Act of 1991, a Title VII the plaintiff may recover damages by showing that the defendant engaged in discrimination "with malice or with reckless indifference to [his or her] federally protected rights." *See* 42 U.S.C. § 1981a(b)(1). *See also* Model Instruction 4.50C, *supra*, on punitive damages and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In 1999, the United States Supreme Court explained that the terms "malice" and "reckless" ultimately focus on the actor's state of mind. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535 (1999). The Court added that the terms pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. *Id.* To be liable for punitive damages, the employer must at least discriminate in the face of a perceived risk that its actions will violate federal law. *Id.* at 536. Rejecting the conclusion of the lower court that punitive damages were limited to cases involving intentional discrimination of an "egregious" nature, the Court held that a plaintiff is not required to show egregious or outrageous discrimination independent of the employer's state of mind. *Id.* at 546.

The *Kolstad* case also established a good-faith defense to place limits on an employer's vicarious liability for punitive damages. Recognizing that Title VII and the ADA are both efforts to promote prevention of discrimination as well as remediation, the Court held that an employer may not be vicariously liable for the discriminatory decisions of managerial agents where those decisions are contrary to the employer's good-faith efforts to comply with Title VII or the ADA. *Id.* at 545. The Court does not clarify which party has the burden of proof on the issue of good faith.

This instruction attempts to incorporate the constitutionally relevant principles set forth by the Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), *BMW of North America, Inc. v. Gore*, 517 U.S.

559 (1996), *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459-62 (1993). In *State Farm*, 538 U.S. at 417, the Court observed: "We have admonished that '[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.'" (quoting *Honda Motor*, 512 U.S. at 432). *See Baker v. John Morrell & Co.*, 266 F. Supp. 2d 909, 961 (N.D. Iowa 2003), *aff'd*, 382 F.3d 816 (8th Cir. 2004), and *In Re Exxon Valdez*, 296 F. Supp. 2d 1071, 1080 (D. Alaska 2004), for examples of punitive damages instructions in which the court attempted to incorporate constitutional standards.

The last paragraph is based on *State Farm*, 538 U.S. at 421, in which the Court held that: "A state cannot punish a defendant for conduct that may have been lawful where it occurred. . . . Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." The Court specifically mandated that: "A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm*, 538 U.S. at 422.

5.03 TITLE VII - VERDICT FORM

VERDICT

Note: Complete the following paragraph by writing in the name required by your verdict.

On the [(sex)[1] discrimination][2] claim of plaintiff [Jane Doe], [as submitted in Instruction ____][3], we find in favor of:

_____

(Plaintiff Jane Doe) or (Defendant XYZ, Inc.)

Note: Answer the next question only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberations on this claim.

Has it been proved[4] that the defendant would have discharged the plaintiff regardless of [(his) (her)] (sex)?[5]

_____Yes _____No
(Mark an "X" in the appropriate space)

Note: Complete the following paragraphs only if your answer to the preceding question is "no." If you answered "yes" to the preceding question, have your foreperson sign and date this form because you have completed your deliberations on this claim.

We find the plaintiff's lost wages and benefits through the date of this verdict to be:

$_____ (stating the amount or, if none, write the word "none").

We find the plaintiff's other damages, excluding lost wages and benefits, to be:

$_____ (stating the amount [or, if you find that the plaintiff's damages do not have a monetary value, write in the nominal amount of One Dollar ($1.00)]).

[We assess punitive damages against the defendant, as submitted in Instruction ____, as follows:

$_____ (stating the amount or, if none, write the word "none").][6]

_____
Foreperson

Dated: _____

Notes on Use

1. This verdict form is designed for use in a gender discrimination case. It must be modified if the plaintiff is claiming discrimination based on race, religion, or some other prohibited factor.

2. The bracketed phrase should be submitted when the plaintiff submits multiple claims to the jury.

3. The number or title of the "essential elements" instruction may be inserted here. *See infra* Model Instruction 5.01.

4. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

5. This question submits the "same decision" issue to the jury. *See infra* Model Instruction 5.01A.

6. This paragraph should be included if the evidence is sufficient to support an award of punitive damages. *See infra* Model Instruction 5.02C.

5.10 AGE DISCRIMINATION IN EMPLOYMENT ACT ("ADEA") OF 1967, AS AMENDED - Introductory Comment

The following instructions are designed for use in jury trials under the ADEA.

Employment Cases - Age Discrimination in Employment Act (ADEA)

5.11 ADEA - ELEMENTS

Your verdict must be for the plaintiff [and against defendant _____][1] [on the plaintiff's age discrimination claim][2] if all the following elements have been proved[3]:

First, the defendant [discharged][4] the plaintiff; and

Second, the defendant would not have [discharged][4] the plaintiff but for[5] the plaintiff's age.

If any of the above elements has not been proved, your verdict must be for the defendant.

"But for" does not require that age was the only reason for the decision made by the defendant. [You may find the defendant would not have discharged the plaintiff "but for" the plaintiff's age if it has been proved that the defendant's stated reason(s) for its decision(s) [(is) (are)] not the real reason(s), but [(is) (are)] a pretext to hide age discrimination].[6]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. This first element is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

5. "To establish a disparate-treatment claim under the plain language of the ADEA, . . . a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, __, 129 S. Ct. 2343, 2350 (2009); *see also Gross v. FBL Financial Services, Inc.*, 588 F.3d 614 (8th Cir. 2009). "Mixed motive" burden-shifting instructions are unavailable in ADEA cases. *Id.*

6. This sentence may be added, if appropriate. *See infra* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Employment Cases - Age Discrimination in Employment Act (ADEA)

Committee Comments

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Supreme Court held that an age discrimination plaintiff may create a submissible issue by showing that the defendant's stated reason for its decision was pretextual.

5.12A ADEA - ACTUAL DAMAGES

If you find in favor of the plaintiff [under Instruction _____,][1] then you must award the plaintiff such sum as you find will fairly and justly compensate the plaintiff for any wages and fringe benefits you find the plaintiff would have earned in [(his) (her)] employment with the defendant if [(he) (she)] had not been discharged on [fill in date of discharge], through the date of your verdict, *minus* the amount of earnings and benefits from other employment received by the plaintiff during that time.[2]

[You are also instructed that the plaintiff has a duty under the law to use reasonable efforts to minimize [(his) (her)] damages. If it has been proved[3] that the plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [(him) (her)], you must reduce [(his) (her)] damages by the amount of the wages and fringe benefits [(he) (she)] reasonably would have earned if [(he) (she)] had sought out or taken advantage of such an opportunity.][4]

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.][5]

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. The formula for "back pay" is "the difference between the value of compensation the plaintiff would have been entitled to had he remained employed by the defendant and whatever wages he earned during the relevant period." *Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1062 (8th Cir. 2002). The value of lost benefits, such as employer-subsidized health, life, disability and other forms of insurance, contributions to retirement, accrued vacation, etc. are recoverable under the ADEA. *Hartley*, 310 F.3d at 1062 (collecting cases); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1110-14 (8th Cir. 1994) (allowing insurance replacement costs, lost 401(K) contributions). This instruction also may be modified to exclude certain items which were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1061-62 (8th Cir. 2002). The burden is on the employer to plead and prove the plaintiff's failure to mitigate. *Id.*

5. This paragraph may be given at the trial court's discretion.

Committee Comments

The goal of a damages award in an age discrimination case is to put the plaintiff in the same economic position he or she would have been in but for the unlawful employment decision. This instruction is designed to submit the standard back pay formula of lost wages and benefits *minus* interim earnings and benefits through the date of verdict. *See Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1061-62 (8th Cir. 2002) (the plaintiff entitled to "most complete relief possible"); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1110-14 (8th Cir. 1994).

This instruction may be modified to articulate the types of interim earnings which should be offset against the plaintiff's back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *Gaworski*, 17 F.3d at 1110-14. However, unemployment compensation, Social Security benefits, and pension benefits received by the plaintiff are considered "collateral source" benefits that are not offset against a back pay award. *See Hartley*, 310 F.3d at 1062; *Doyne v. Union Electric Co.*, 953 F.2d 447, 451-52 (8th Cir. 1992) (holding that pension benefits are a "collateral source benefit"); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1110-14 (8th Cir. 1994) (unemployment benefits, moonlighting income also not deductible).

In some cases, a discrimination plaintiff may be eligible for future lost income and benefits ("front pay"). *Hartley*, 310 F.3d 1062-63. Because front pay is essentially an equitable remedy "in lieu of reinstatement," front pay is an issue for the court, not the jury. *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999). *Newhouse v. McCormick & Co.*, 110 F.3d 635, 641 (8th Cir. 1997) (front pay is an issue for the court, not the jury, in ADEA cases).

Employment Cases - Age Discrimination in Employment Act (ADEA)

5.12B ADEA - NOMINAL DAMAGES

[Nominal damages normally are not appropriate in ADEA cases.][1]

Notes on Use

1. If a nominal damages instruction is deemed appropriate, *see supra* Model Instruction 5.02B.

Committee Comments

Recoverable damages in ADEA cases normally are limited to lost wages and benefits and in most ADEA cases, it will be undisputed that the plaintiff has some actual damages. Although case law does not clearly authorize this remedy in age discrimination cases, a nominal damage instruction may be considered in appropriate cases, and Model Instruction 5.02B, *supra*, should be used. Most cases that allow nominal damages just assume they are permissible without much discussion of the issue. *See e.g., Drez v. E.R. Squibb & Sons, Inc.*, 674 F. Supp. 1432, 1438 (D. Kan. 1987) (ADEA); *Graefenhain v. Pabst Brewing Co.*, 670 F. Supp. 1415, 1416 (E.D. Wis. 1987) (ADEA).

5.12C ADEA - WILLFULNESS

If you find in favor of the plaintiff under Instruction _____,[1] then you must decide whether the conduct of the defendant was "willful." You must find the defendant's conduct was willful if it has been proved[2] that, when the defendant [discharged][3] the plaintiff, the defendant knew [the discharge] was in violation of the federal law prohibiting age discrimination, or acted with reckless disregard of that law.

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, or where the plaintiff resigned but claims he or she was "constructively discharged," the instruction must be modified.

Committee Comments

The standard set forth in the instruction is consistent with that mandated by *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). *See also Spencer v. Stuart Hall Co., Inc.*, 173 F.3d 1124 (8th Cir. 1999). For a discussion of the evidence necessary to justify a submission on the issue of wilfulness, *see Maschka v. Genuine Parts Co.,* 122 F.3d 566 (8th Cir. 1997); *Spencer v. Stuart Hall Co., Inc.*, 173 F.3d 1124 (8th Cir. 1999); *Hartley v. Dillard's, Inc.*, 310 F.3d 1054 (8th Cir. 2002).

5.13 ADEA - VERDICT FORM

VERDICT

Note: Complete this form by writing in the names required by your verdict.

On the [age discrimination][1] claim of plaintiff [John Doe], [as submitted in Instruction _____][2], we find in favor of

_____

(Plaintiff John Doe) or (Defendant XYZ, Inc.)

Note: Complete the following paragraphs only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberation on this claim.

We find the plaintiff's damages to be:

$_____ (stating the amount or, if none, write the word "none").[3]

Was the defendant's conduct "willful" as that term is defined in Instruction _____?[4]

Yes _____ No _____

(Place an "X" in the appropriate space.)

_____

Foreperson

Dated: _____

Notes on Use

1. The bracketed language should be included when the plaintiff submits multiple claims to the jury.

2. The number or title of the "essential elements" instruction should be inserted here.

3. This paragraph must be modified if the issue of nominal damages is submitted. *But see supra* Committee Comments, Model Instruction 5.12A.

4. The number or title of the instruction defining "willfulness" should be inserted. *See supra* Model Instruction 5.12C.

5.20 RACE DISCRIMINATION (42 U.S.C. § 1981) - Introductory Comment

Section 1981 of Title 42, United States Code, which prohibits race discrimination in the making and enforcement of contracts, provides a cause of action for race discrimination in employment claims. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *see also Swapshire v. Baer*, 865 F.2d 948 (8th Cir. 1989). Race discrimination claimants often join claims under § 1981 with claims under Title VII because § 1981, unlike Title VII, does not limit the recovery of compensatory and punitive damages. If the plaintiff joins a jury-triable claim under Title VII with a § 1981 claim, the Committee recommends the use of the 5.01 series of instructions and accompanying verdict form. Although there is a distinction between Title VII and § 1981 in terms of the threshold for liability, the 5.01 series of instructions will yield all of the required findings for a § 1981 case.

The following instructions are designed for use in all cases brought pursuant to 42 U.S.C. § 1981. In the interests of simplicity and uniformity, the model instruction on the issue of liability utilizes a motivating-factor/same-decision format for all cases. Nevertheless, if the trial court believes it is appropriate to distinguish between a mixed motive case and a pretext case, Model Instruction 5.21B, *infra*, contains a sample determining factor instruction. Moreover, if the trial court is inclined to adhere to a pretext/mixed motive distinction but cannot determine how to categorize a particular case, Model Instruction 5.92, *infra*, contains a set of special interrogatories designed to elicit a complete set of findings for post-trial analysis.

Employment Cases - Race Discrimination

5.21A (RACE) DISCRIMINATION - ELEMENTS (Motivating Factor) (42 U.S.C. § 1981)

Your verdict must be for the plaintiff [and against defendant _____][1] [on the plaintiff's (race) discrimination claim][2] if all the following elements have been proved[3]:

First, the defendant [failed to hire][4] the plaintiff; and

Second, the plaintiff's (race) [was a motivating factor][5] [played a part][6] in the defendant's decision.

However, your verdict must be for the defendant if any of the above elements has not been proved, or if it has been proved that the defendant would have decided not to [hire] the plaintiff regardless of [(his) (her)] (race). [You may find that the plaintiff's (race) [was a motivating factor] [played a part] in the defendant's (decision)[7] if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] not the real reason(s), but [(is) (are)] a pretext to hide (race) discrimination.] [8]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. This instruction is designed for use in a "failure to hire" case. In a discharge or "failure to promote" case, the instruction must be modified. In "constructive discharge" cases, *see infra* Model Instruction 5.93.

5. The appropriate standard in a section 1981 case is not clearly resolved. "Motivating factor" was used previously in these instructions and these cases have many similarities to Title VII cases. The phrase "motivating factor" should be defined, if used. *See infra* Model Instruction 5.96. If the court decides "determining factor" is appropriate, use *infra* Model Instruction 5.21B. If the court is uncertain as to which standard should be used in a particular case, the Special Interrogatories in Model Instruction 5.92, *infra*, may be used.

6. *See supra* Model Instruction 5.96, which defines "motivating factor" in terms of whether the characteristic "played a part or a role" in the defendant's decision. The phrase "motivating factor" need not be defined if the definition itself is used in the element instruction.

7. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

8. This sentence may be added, if appropriate. *See infra* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Employment Cases - Race Discrimination

5.21B (RACE) - ELEMENTS (Determining Factor) (42 U.S.C. § 1981)

Your verdict must be for the plaintiff [and against defendant _____][1] [on the plaintiff's (race) discrimination claim][2] if all the following elements have been proved[3]:

First, the defendant [discharged][4] the plaintiff; and

Second, the plaintiff's (race) was a determining factor in the defendant's decision.

Your verdict must be for the defendant if any of the above elements has not been proved.

"(Race) was a determining factor" only if the defendant would not have discharged the plaintiff but for the plaintiff's (race); it does not require that (race) was the only reason for the decision made by the defendant.[5] [You may find (race) was a determining factor if it has been proved that the defendant's stated reason(s) for its decision(s) [(is) (are)] not the real reason(s), but [(is) (are)] a pretext to hide (race) discrimination].[6]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

5. This definition of the phrase "(___) was a determining factor" is based on *Grebin v. Sioux Falls Indep. School Dist. No. 49-5*, 779 F.2d 18, 20 n.1 (8th Cir. 1985).

6. This sentence may be added, if appropriate. *See infra* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

See supra Note on Use 5 to Model Instruction 5.21A.

5.22A RACE DISCRIMINATION - ACTUAL DAMAGES (42 U.S.C. § 1981)

If you find in favor of the plaintiff [under Instruction _____][1], then you must award the plaintiff such sum as you find will fairly and justly compensate [(him) (her)] for damages you find [(he) (she)] sustained as a direct result of the defendant's conduct as described in Instruction _____.[1] Damages include wages or fringe benefits you find the plaintiff would have earned in [(his) (her)] employment with the defendant if [(he) (she)] had not been discharged on (fill in date of discharge), through the date of your verdict, *minus* the amount of earnings and benefits from other employment received by the plaintiff during that time.][2] Damages also may include [list damages supported by the evidence].[3]

[You are also instructed that the plaintiff has a duty under the law to "mitigate" [(his) (her)] damages--that is, to exercise reasonable diligence under the circumstances to minimize [(his) (her)] damages. Therefore, if you find that the plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [(him) (her)], you must reduce [(his) (her)] damages by the amount of the wages and fringe benefits the plaintiff reasonably could have earned if [(he) (she)] had sought out or taken advantage of such an opportunity.][4]

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.][5]

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. When certain benefits, such as employer-subsidized health insurance benefits, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. Claims for lost benefits often present difficult issues as to the proper measure of recovery. *See Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 470 (8th Cir. 1989) (discussing different approaches). Some courts deny recovery for lost benefits unless the employee purchases substitute coverage, in which case the measure of damages is the employee's out-of-pocket expenses. *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 161 (7th Cir. 1981), *overruled on other grounds*, 860 F.2d 834 (7th Cir. 1988); *Pearce v. Carrier Corp.*, 966 F.2d 958 (5th Cir. 1992). Other courts permit the recovery of the amount the employer would have paid as premiums on the employee's behalf. *Fariss*, 769 F.2d at 964-65. The Committee expresses no view as to which approach is proper. This instruction also may

be modified to exclude certain items which were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.

3. In section 1981 cases, a prevailing plaintiff may recover damages for mental anguish, damage to reputation, or other personal injuries. *See Wilmington v. J.I. Case Co.*, 793 F.2d 909, 921 (8th Cir. 1986). The specific elements of damages set forth in this instruction are similar to those found in the Civil Rights Act of 1991. *See* 42 U.S.C. § 1977A(b)(3). *See supra* Model Instruction 5.02A n.8.

4. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983).

5. This paragraph may be given at the trial court's discretion.

Committee Comments

This instruction is designed to submit the standard back pay formula of lost wages and benefits *minus* interim earnings and benefits. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808 (8th Cir. 1982). Moreover, because § 1981 is open-ended in the types of damages which may be recovered, this instruction also permits the recovery of general damages for pain, suffering, humiliation, and the like. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 182 n.4 (1989). Unlike Title VII cases under the Civil Rights Act of 1991, there is no "cap" on damages under section 1981.

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy "in lieu of" reinstatement, front pay is an issue for the court, not the jury. *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999). *See MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1060 (8th Cir. 1988); *Newhouse v. McCormick & Co.*, 110 F.3d 635, 641 (8th Cir. 1997) (front pay is an issue for the court, not the jury, in ADEA cases). If the trial court submits the issue of front pay to the jury, the jury's determination may be binding. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (ADEA case).

This instruction may be modified to articulate the types of interim earnings which should be offset against the plaintiff's back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See Krause v. Dresser Indus.*, 910 F.2d 674, 680 (10th Cir. 1990); *Cornetta v. United States*, 851 F.2d 1372, 1381 (Fed. Cir. 1988); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). Unemployment compensation, Social Security benefits or pension benefits ordinarily are not offset against a back pay award. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (holding that pension benefits are a "collateral source benefit"); *Dreyer v. Arco Chemical Co.*, 801 F.2d 651, 653 n.1 (3d Cir. 1986) (Social Security and pension benefits not deductible); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 138-39 (3d Cir. 1986) (unemployment benefits not deductible); *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (same). *But cf. Blum v. Witco Chemical Corp.*, 829 F.2d 367, 374 (3d Cir. 1987) (pension benefits received as a result of subsequent employment considered in offsetting damages award); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of unemployment compensation

is within trial court's discretion); *Horn v. Duke Homes*, 755 F.2d 599, 607 n.12 (7th Cir. 1985) (same); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976) (same).

This instruction is designed to encompass a situation where the defendant asserts some independent post-discharge reason--such as a plant closing or sweeping reduction in force--why the plaintiff would have been terminated in any event before trial. *See*, *e.g.*, *Cleverly v. Western Elec. Co.*, 450 F. Supp. 507 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979). Nevertheless, the trial court may give a separate instruction which submits this issue in more direct terms.

5.22B RACE DISCRIMINATION - NOMINAL DAMAGES (42 U.S.C. § 1981)

If you find in favor of the plaintiff under Instruction _____[1], but you do not find that the plaintiff's damages have monetary value, then you must return a verdict for the plaintiff in the nominal amount of One Dollar ($1.00).[2]

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. One Dollar ($1.00) arguably is the required amount in cases in which nominal damages are appropriate. Nominal damages are appropriate when the jury is unable to place a monetary value on the harm that the plaintiff suffered from the violation of his rights. *Cf. Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) (in prisoner civil rights action, nominal damages are appropriate where the jury cannot place a monetary value on the harm suffered by the plaintiff); *Haley v. Wyrick*, 740 F.2d 12 (8th Cir. 1984).

Committee Comments

Most employment discrimination cases involve lost wages and benefits. In some cases, however, the jury may be permitted to return a verdict for only nominal damages. For example, if the plaintiff was given severance pay and was able to secure a better paying job, the evidence may not support an award of back pay, but may support an award of compensatory damages. This instruction is designed to submit the issue of nominal damages in appropriate cases.

If nominal damages are submitted, the verdict form must contain a line where the jury can make that finding.

An award of nominal damages can support a punitive damage award. *See Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541, 548 (8th Cir. 1984) (§ 1983 case).

5.22C RACE DISCRIMINATION - PUNITIVE DAMAGES (42 U.S.C. § 1981)

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award punitive damages.

If you find in favor of the plaintiff and against defendant [name], [and if it has been proved[1] that the plaintiff's firing was motivated by evil motive or intent, or that the defendant was recklessly indifferent to the plaintiff's rights,][2] then, in addition to any other damages to which you find the plaintiff entitled, you may, but are not required to, award the plaintiff an additional amount as punitive damages for the purposes of punishing the defendant for engaging in such misconduct and deterring the defendant and others from engaging in such misconduct in the future.

[However, you may not award punitive damages if it has been proved[1] [that the defendant made a good-faith effort to comply with the law prohibiting race discrimination][3]. You should presume that a plaintiff has been made whole for [his, her, its] injuries by the damages awarded under Instruction _____.[4]

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. How reprehensible the defendant's conduct was.[5] In this regard, you may consider [whether the harm suffered by the plaintiff was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether the defendant's conduct that harmed the plaintiff also posed a risk of harm to others; whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed the plaintiff].6

2. How much harm the defendant's wrongful conduct caused the plaintiff [and could cause the plaintiff in the future].[7] [You may not consider harm to others in deciding the amount of punitive damages to award.][8]

3. What amount of punitive damages, in addition to the other damages already awarded, is needed, considering the defendant's financial condition, to punish the defendant for [his, her,

its] wrongful conduct toward the plaintiff and to deter the defendant and others from similar wrongful conduct in the future.

4. [The amount of fines and civil penalties applicable to similar conduct].[9]

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to the plaintiff.[10]

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against those defendants may be the same or they may be different.][11]

[You may not award punitive damages against the defendant[s] for conduct in other states.][12]

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Use if more than one element instruction.

3. Punitive damages are allowed even though the threshold for liability requires reckless conduct. If the threshold for the underlying tort liability is less than "reckless," the bracketed language correctly states the standard for punitive damages under 42 U.S.C. § 1983. *Smith v. Wade*, 461 U.S. 30 (1983). *See Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535, 536 (1999), and *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 903 (8th Cir. 2006), discussing the meaning of "malice" and "reckless indifference." If the threshold for liability is "malice" or "reckless indifference" or something more culpable, no additional finding should be necessary because the language in the issue/element instruction requires the jury to find the culpability necessary for imposing punitive damages. However, it is recommended that the punitive damages instruction include such language to be sure the jury focuses on that issue.

4. Fill in the number or title of the actual damages or nominal damages instruction here.

5. The word "reprehensible" is used in the same sense as it is used in common parlance. The Supreme Court, in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003), stated: "It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." In *Philip Morris USA v. Williams*, 549 U.S. 346, 355, 127 S. Ct. 1057, 1064-65 (2007), the Supreme Court held that, while harm to persons other than the plaintiff may be considered in determining reprehensibility, a jury may not punish for the harm caused to persons other than the plaintiff. The Court stated that procedures were

necessary to assure "that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* at 355.

6. Any item not supported by the evidence, of course, should be excluded.

7. This sentence may be used if there is evidence of future harm to the plaintiff.

8. A paragraph instructing the jury that any punitive damages award should not include an amount for harm suffered by persons who are not parties to the case may be necessary if evidence concerning harm suffered by nonparties has been introduced. *See Philip Morris USA v. Williams*, 549 U.S. at 355, 127 S. Ct. at 1064-65; *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 422-24 (2003); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004).

9. Insert this phrase only if evidence has been introduced, or the court has taken judicial notice, of fines and penalties for similar conduct. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996), noting "civil penalties authorized in comparable cases" as a guidepost to be considered. *See also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003).

10. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (stating that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" and observing that: "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to1 [citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996)] or, in this case, of 145 to 1.").

11. The bracketed language is available for use if punitive damages claims are submitted against more than one defendant.

12. If evidence has been introduced concerning conduct by the defendant that was legal in the state where it was committed, the jury must be told that they cannot award punitive damages against the defendant for such conduct. *See State Farm Mut. Auto. Inc. Co. v. Campbell*, 538 U.S. 408, 422 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572-73 (1996); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004). This issue normally will not come up in cases under federal law. In any case in which evidence is admitted for some purposes but may not be considered by the jury in awarding punitive damages, the court should give an appropriate limiting instruction.

Committee Comments

This instruction attempts to incorporate the constitutionally relevant principles set forth by the Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459-62 (1993). In *State Farm*, 538 U.S. at 417, the court observed: "We have admonished that '[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion

in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.'" (quoting *Honda Motor*, 512 U.S. at 432). *See Baker v. John Morrell & Co.*, 266 F. Supp. 2d 909, 961 (N.D. Iowa 2003), *aff'd*, 382 F.3d 816 (8th Cir. 2004), and *In Re Exxon Valdez*, 296 F. Supp. 2d 1071, 1080 (D. Alaska 2004), for examples of punitive damages instructions in which the court attempted to incorporate constitutional standards.

The last paragraph is based on *State Farm*, 538 U.S. at 421, in which the court held that: "A state cannot punish a defendant for conduct that may have been lawful where it occurred. . . . Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." The court specifically mandated that: "A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm*, 538 U.S. at 422.

5.23 RACE DISCRIMINATION - VERDICT FORM (42 U.S.C. § 1981)

VERDICT

Note: Complete this form by writing in the names required by your verdict.

On the [race discrimination][1] claim of plaintiff [John Doe], as submitted in Instruction _____[2], we find in favor of

_____

(Plaintiff Jane Doe) or (Defendant XYZ, Inc.)

Note: Complete the following paragraphs only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberation on this claim.

We find the plaintiff's damages as defined in Instruction _____[3] to be:

$_____ (stating the amount or, if none, write the word "none")[4]

(stating the amount, or if you find that the plaintiff's damages have no monetary value, set forth a nominal amount such as $1.00).[5]

We assess punitive damages against defendant (name), as submitted in Instruction _____,[6] as follows:

$_____ (stating the amount or, if none, write the word "none").

_____
Foreperson

Dated: _____

Notes on Use

1. The bracketed language should be included when the plaintiff submits multiple claims to the jury.

2. The number or title of the "essential elements" instruction should be inserted here.

3. The number or title of the "actual damages" instruction should be inserted here.
4. Use this phrase if the jury has not been instructed on nominal damages.
5. Include this paragraph if the jury is instructed on nominal damages.
6. The number or title of the "punitive damages" instruction should be inserted here.

5.25 DISCRIMINATION BY PUBLIC EMPLOYERS (42 U.S.C. § 1983)
Introductory Comment

Discrimination claims against public employers are often brought under 42 U.S.C. § 1983 as well as Title VII. *E.g., Tyler v. Hot Springs Sch. Dist. No. 6*, 827 F.2d 1227 (8th Cir. 1987); *Hervey v. City of Little Rock*, 787 F.2d 1223 (8th Cir. 1986). Section 1983 historically included three components which Title VII did not contain: (1) the right to a jury trial; (2) the availability of general damages for humiliation, loss of reputation, and the like; and (3) the availability of punitive damages against individual defendants. Although the Civil Rights Act of 1991 has eliminated these differences, section 1983 claims will remain distinctive in two respects: (1) section 1983 does not require exhaustion of the EEOC administrative process; and (2) section 1983 does not place a cap on compensatory and punitive damages. The theory of liability in a section 1983 discrimination claim is that discrimination on the basis of race, gender, or religion constitutes a deprivation of equal protection and, thus, violates the Fourteenth Amendment. The Committee expresses no position on the issue of whether discrimination on the basis of age or disability is within the purview of section 1983.

The following instructions are designed for use in all discrimination cases brought pursuant to 42 U.S.C. § 1983. In the interests of simplicity and uniformity, the model instruction on the issue of liability utilizes a motivating-factor/same-decision format for all cases. *See infra* Model Instruction 5.26A. Nevertheless, if the trial court believes it is appropriate to distinguish between a mixed motive case and a pretext case, Model Instruction 5.26B, *infra*, contains a sample pretext instruction. Moreover, if the trial court is inclined to adhere to a pretext/mixed motive distinction but cannot determine how to categorize a particular case, Model Instruction 5.92, *infra*, contains a set of special interrogatories designed to elicit a complete set of findings for post-trial analysis.

Employment Cases - Discrimination by Public Employers

5.26A (SEX) DISCRIMINATION - ELEMENTS (Mixed Motive Case) (42 U.S.C. § 1983)

Your verdict must be for the plaintiff [and against defendant _____][1] [on the plaintiff's (sex)[2] discrimination claim][3] if both of the following elements have been proved[4]:

First, the defendant [discharged][5] the plaintiff; and

Second, the plaintiff's (sex) [was a motivating factor][6] [played a part][7] in the defendant's decision[; and

Third, the defendant was acting under color of state law].[8]

However, your verdict must be for the defendant if any of the above elements has not been proved, or if it has been proved that the defendant would have [discharged] the plaintiff regardless of [(his) (her)] (sex). [You may find that the plaintiff's (sex) [was a motivating factor] [play a part] in the defendant's (decision)[9] if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] not the real reason(s), but [(is) (are)] a pretext to hide (sex) discrimination.][10]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. This instruction is designed for use in a gender discrimination case. It must be modified if the plaintiff is claiming discrimination on the basis of race, religion, or other unlawful basis.

3. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

4. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

5. This instruction is designed for use in a discharge case. In a "failure to hire" "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

6. The appropriate standard in a section 1983 case is not clearly resolved. "Motivating factor" was used previously in these instructions and these cases have many similarities to Title VII cases. The phrase "motivating factor" should be defined, if used. *See infra* Model Instruction 5.96. If the court decides "determining factor" is appropriate, use *infra* Model

Instruction 5.26B. If the court is uncertain as to which standard should be used in a particular case, the Special Interrogatories in Model Instruction 5.92, *infra*, may be used.

7. *See infra* Model Instruction 5.96, which defines "motivating factor" in terms of whether the characteristic "played a part or a role" in the defendant's decision. The phrase "motivating factor" need not be defined if the definition itself is used in the element instruction.

8. Use this language if the issue of whether the defendant was acting under color of state law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, this element will be conceded by the defendant. If so, it need not be included in this instruction.

9. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

10. This sentence may be added, if appropriate. *See infra* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

To prevail on a section 1983 discrimination claim, the plaintiff must prove intentional discrimination. *Washington v. Davis*, 426 U.S. 229, 240 (1976). This intent to discriminate must be a causal factor in the defendant's employment decision. *Tyler v. Hot Springs School Dist. No. 6*, 827 F.2d 1227, 1230-31 (8th Cir. 1987).

Employment Cases - Discrimination by Public Employers

5.26B (SEX) DISCRIMINATION - ELEMENTS (Determining Factor) (42 U.S.C. § 1983)

Your verdict must be for the plaintiff [and against defendant _____][1] [on the plaintiff's (sex) discrimination claim][2] if all the following elements have been proved[3]:

First, the defendant [discharged][4] the plaintiff; and

Second, the plaintiff's (sex) was a determining factor in the defendant's decision.

Your verdict must be for the defendant if any of the above elements has not been proved.

"(Sex) was a determining factor" only if the defendant would not have discharged the plaintiff but for the plaintiff's (sex); it does not require that (sex) was the only reason for the decision made by the defendant.[5] [You may find (sex) was a determining factor if it has been proved that the defendant's stated reason(s) for its decision(s) [(is) (are)] not the real reason(s), but [(is) (are)] a pretext to hide (sex) discrimination].[6]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

5. This definition of the phrase "(___) was a determining factor" is based on *Grebin v. Sioux Falls Indep. School Dist. No. 49-5*, 779 F.2d 18, 20 n.1 (8th Cir. 1985).

6. This sentence may be added, if appropriate. *See infra* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

See supra Note on Use 6 to Model Instruction 5.26A.

Employment Cases - Discrimination by Public Employers

5.27A ACTUAL DAMAGES (42 U.S.C. § 1983)

If you find in favor of the plaintiff under Instruction _____,[1] then you must award the plaintiff such sum as you find will fairly and justly compensate the plaintiff for any actual damages you find the plaintiff sustained as a direct result of the defendant's conduct as submitted in Instruction _____.[2] Actual damages include any wages or fringe benefits you find the plaintiff would have earned in [(his) (her)] employment with the defendant if [(he) (she)] had not been discharged on [fill in date of discharge], through the date of your verdict, *minus* the amount of earnings and benefits from other employment received by the plaintiff during that time.[3] Actual damages also may include [list damages supported by the evidence].[4]

[You are also instructed that the plaintiff has a duty under the law to "mitigate" [(his) (her)] damages--that is, to exercise reasonable diligence under the circumstances to minimize [(his) (her)] damages. Therefore, if it has been proved[5] that the plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [(him) (her)], you must reduce [(his) (her)] damages by the amount [(he) (she)] reasonably could have avoided if [(he) (she)] had sought out or taken advantage of such an opportunity.][6] [Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.][7]

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. When certain benefits, such as employer-subsidized health insurance benefits, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. Claims for lost benefits often present difficult issues as to the proper measure of recovery. *See Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 470 (8th Cir. 1989) (discussing different approaches). Some courts deny recovery for lost benefits unless the employee purchases substitute coverage, in which case the measure of damages is the employee's out-of-pocket expenses. *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 161 (7th Cir. 1981); *Pearce v. Carrier Corp.*, 966 F.2d 958 (5th Cir. 1992). Other courts permit the recovery of the amount the employer would have paid as premiums on the employee's behalf. *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 964-65 (4th Cir. 1985). The Committee expresses no view as to which approach is proper. This instruction also may be modified to exclude certain items which were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.

3. This sentence should be used to guide the jury in calculating the plaintiff's economic damages. In section 1983 cases, however, a prevailing plaintiff may recover actual damages for emotional distress and other personal injuries. *See Carey v. Piphus*, 435 U.S. 247 (1978).

4. In section 1983 cases, a prevailing plaintiff may recover damages for mental anguish and other personal injuries. The specific elements of damages that may be set forth in this instruction are similar to those found in the Civil Rights Act of 1991. *See* 42 U.S.C. § 1981a(b)(3). *See supra* Model Instruction 5.02A n.8.

5. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

6. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983).

7. This paragraph may be given at the trial court's discretion.

Committee Comments

This instruction is designed to submit the standard back pay formula of lost wages and benefits reduced by interim earnings and benefits. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808 (8th Cir. 1982). Moreover, because section 1983 damages are not limited to back pay, the instruction also permits the recovery of general damages for pain, suffering, humiliation, and the like.

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy "in lieu of" reinstatement, front pay is an issue for the court, not the jury. *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999). *See MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1060 (8th Cir. 1988); *Newhouse v. McCormick & Co.*, 110 F.3d 635, 641 (8th Cir. 1997) (front pay is an issue for the court, not the jury, in ADEA cases). If the trial court submits the issue of front pay to the jury, the jury's determination may be binding. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (ADEA case).

This instruction may be modified to articulate the types of interim earnings which should be offset against the plaintiff's back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See Krause v. Dresser Indus.,* 910 F.2d 674, 680 (10th Cir. 1990); *Cornetta v. United States*, 851 F.2d 1372, 1381 (Fed. Cir. 1988); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). Unemployment compensation, Social Security benefits or pension benefits ordinarily are not offset against a back pay award. *See Doyne v. Union Elec. Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (holding that pension benefits are a "collateral source benefit"); *Dreyer v. Arco Chem. Co.*, 801 F.2d 651, 653 n.1 (3d Cir. 1986) (Social Security and pension benefits not deductible); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 138-39 (3d Cir. 1986) (unemployment benefits not deductible); *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (same). *But cf. Blum v. Witco Chem. Corp.*, 829 F.2d 367, 374 (3d Cir. 1987) (pension benefits received as a result of subsequent employment considered in offsetting damages award); *Toledo v. Nobel-Sysco, Inc.*,

892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of unemployment compensation is within trial court's discretion); *Horn v. Duke Homes*, 755 F.2d 599, 607 n.12 (7th Cir. 1985) (same); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976) (same).

This instruction is designed to encompass a situation where the defendant asserts some independent post-discharge reason--such as a plant closing or sweeping reduction in force--why the plaintiff would have been terminated in any event before trial. *See*, *e.g.*, *Cleverly v. Western Elec. Co.*, 450 F. Supp. 507 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979). Nevertheless, the trial court may give a separate instruction which submits this issue in more direct terms.

Employment Cases - Discrimination by Public Employers

5.27B NOMINAL DAMAGES (42 U.S.C. § 1983)

If you find in favor of the plaintiff under Instruction _____[1], but you do not find that the plaintiff's damages have monetary value, then you must return a verdict for the plaintiff in the nominal amount of One Dollar ($1.00).[2]

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. One Dollar ($1.00) arguably is the required amount in cases in which nominal damages are appropriate. Nominal damages are appropriate when the jury is unable to place a monetary value on the harm that the plaintiff suffered from the violation of his or her rights. *Cf. Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) (in prisoner civil rights action, nominal damages are appropriate where the jury cannot place a monetary value on the harm suffered by the plaintiff); *Haley v. Wyrick*, 740 F.2d 12 (8th Cir. 1984).

Committee Comments

Most employment discrimination cases involve lost wages and benefits. Nevertheless, a nominal damage instruction should be given in appropriate cases, such as where a plaintiff claiming a discriminatory harassment did not sustain any loss of earnings. *Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541, 542-43, 548 (8th Cir. 1984).

An award of nominal damages can support a punitive damage award. *See Goodwin*, 729 F.2d at 548.

If nominal damages are submitted, the verdict form must contain a line where the jury can make that finding.

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5.27C PUNITIVE DAMAGES (42 U.S.C. § 1983)

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award punitive damages.

If you find in favor of the plaintiff and against defendant [name][1], [and if it has been proved[2] that the plaintiff's firing was motivated by evil motive or intent, or that the defendant was recklessly indifferent to the plaintiff's rights][3], then in addition to any other damages to which you find the plaintiff entitled, you may, but are not required to, award the plaintiff an additional amount as punitive damages for the purposes of punishing the defendant for engaging in such misconduct and deterring the defendant and others from engaging in such misconduct in the future. You should presume that a plaintiff has been made whole for [his, her, its] injuries by the damages awarded under Instruction _____.[4]

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. How reprehensible the defendant's conduct was.[5] In this regard, you may consider [whether the harm suffered by the plaintiff was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether the defendant's conduct that harmed the plaintiff also posed a risk of harm to others; whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed the plaintiff].[6]

2. How much harm the defendant's wrongful conduct caused the plaintiff [and could cause the plaintiff in the future].[7] [You may not consider harm to others in deciding the amount of punitive damages to award.][8]

3. What amount of punitive damages, in addition to the other damages already awarded, is needed, considering the defendant's financial condition, to punish the defendant for [his, her, its] wrongful conduct toward the plaintiff and to deter the defendant and others from similar wrongful conduct in the future.

4. [The amount of fines and civil penalties applicable to similar conduct].[9]

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to the plaintiff.[10]

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against those defendants may be the same or they may be different.][11]

[You may not award punitive damages against the defendant[s] for conduct in other states.][12]

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Use if more than one element instruction.

3. Punitive damages are allowed even though the threshold for liability requires reckless conduct. If the threshold for the underlying tort liability is less than "reckless," the bracketed language correctly states the standard for punitive damages under 42 U.S.C. § 1983. *Smith v. Wade*, 461 U.S. 30 (1983). *See Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535, 536 (1999), and *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 903 (8th Cir. 2006), discussing the meaning of "malice" and "reckless indifference." If the threshold for liability is "malice" or "reckless indifference" or something more culpable, no additional finding should be necessary because the language in the issue/element instruction requires the jury to find the culpability necessary for imposing punitive damages. However, it is recommended that the punitive damages instruction include such language to be sure the jury focuses on that issue.

4. Fill in the number or title of the actual damages or nominal damages instruction here.

5. The word "reprehensible" is used in the same sense as it is used in common parlance. The Supreme Court, in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003), stated: "It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." In *Philip Morris USA v. Williams*, 549 U.S. 346, 355, 127 S. Ct. 1057, 1064-65 (2007), the Supreme Court held that, while harm to persons other than the plaintiff may be considered in determining reprehensibility, a jury may not punish for the harm caused to persons other than the plaintiff. The Court stated that procedures were necessary to assure "that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* at 355.

6. Any item not supported by the evidence, of course, should be excluded.

7. This sentence may be used if there is evidence of future harm to the plaintiff.

8. A paragraph instructing the jury that any punitive damages award should not include an amount for harm suffered by persons who are not parties to the case may be necessary if evidence concerning harm suffered by nonparties has been introduced. *See Philip Morris USA v. Williams*, 549 U.S. at 355, 127 S. Ct. at 1064-65; *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 422-24 (2003); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004).

9. Insert this phrase only if evidence has been introduced, or the court has taken judicial notice, of fines and penalties for similar conduct. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996), noting "civil penalties authorized in comparable cases" as a guidepost to be considered. *See also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003).

10. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (stating that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" and observing that: "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to1 [citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996)] or, in this case, of 145 to 1.").

11. The bracketed language is available for use if punitive damages claims are submitted against more than one defendant.

12. If evidence has been introduced concerning conduct by the defendant that was legal in the state where it was committed, the jury must be told that they cannot award punitive damages against the defendant for such conduct. *See State Farm Mut. Auto. Inc. Co. v. Campbell*, 538 U.S. 408, 422 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572-73 (1996); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004). This issue normally will not come up in cases under federal law. In any case in which evidence is admitted for some purposes but may not be considered by the jury in awarding punitive damages, the court should give an appropriate limiting instruction.

Committee Comments

This instruction attempts to incorporate the constitutionally relevant principles set forth by the Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459-62 (1993). In *State Farm*, 538 U.S. at 417, the Court observed: "We have admonished that '[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.'" (quoting *Honda Motor*, 512 U.S. at 432). *See Baker v. John Morrell & Co.*, 266 F. Supp. 2d 909, 961 (N.D. Iowa 2003), *aff'd*, 382 F.3d 816 (8th Cir. 2004), and *In Re Exxon Valdez*, 296 F. Supp. 2d 1071, 1080 (D. Alaska 2004), for examples of

punitive damages instructions in which the court attempted to incorporate constitutional standards.

The last paragraph is based on *State Farm*, 538 U.S. at 421, in which the Court held that: "A state cannot punish a defendant for conduct that may have been lawful where it occurred. . . . Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." The Court specifically mandated that: "A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm*, 538 U.S. at 422.

Employment Cases - Discrimination by Public Employers

5.28 VERDICT FORM (42 U.S.C. § 1983)

VERDICT

Note: Complete this form by writing in the names required by your verdict.

On the [(sex)[1] discrimination][2] claim of plaintiff [John Doe], as submitted in Instruction _____[3], we find in favor of

_____

(Plaintiff John Doe) or (Defendant Sam Smith)

Note: Complete the following paragraphs only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberation on this claim.

We find plaintiff's (name) damages as defined in Instruction ____[4] to be:

$_____ (stating the amount or, if none, write the word "none")[5]

(stating the amount, or if you find that the plaintiff's damages have no monetary value, set forth a nominal amount such as $1.00).[6]

We assess punitive damages against defendant (name), as submitted in Instruction _____,[7] as follows:

$_____ (stating the amount or, if none, write the word "none").

_____

Foreperson

Dated: _____

Employment Cases - Discrimination by Public Employers

Notes on Use

1. This verdict form is designed for use in a gender discrimination claim. It must be modified if the plaintiff is claiming a different form of discrimination.

2. The bracketed language should be included when the plaintiff submits multiple claims to the jury.

3. The number or title of the "essential elements" instruction should be inserted here.

4. The number or title of the "actual damages" instruction should be inserted here.

5. Use this phrase if the jury has not been instructed on nominal damages.

6. Include this paragraph if the jury is instructed on nominal damages.

7. The number or title of the "punitive damages" instruction should be inserted here.

5.30 EQUAL PAY ACT
Introductory Comment

The Equal Pay Act, 29 U.S.C. § 206(d), with certain exceptions, prohibits employers from discriminating against employees on the basis of sex with respect to wages paid for equal work performed under similar working conditions. The Equal Pay Act, which is part of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, provides:

> No employer having employees subject to [the minimum wage provisions of the Fair Labor Standards Act] shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .

29 U.S.C. § 206(d)(1).

The following instructions are designed for use in cases brought pursuant to the Equal Pay Act. It is important to note that a plaintiff may bring a federal claim for wage discrimination on the basis of sex under either the Equal Pay Act or Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. § 2000e *et seq*. *See Simmons v. New Pub. Sch. Dist. No. 8*, 251 F.3d 1210, 1215 (8th Cir. 2001); *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 669 (8th Cir. 1992). If the plaintiff is claiming wage discrimination under Title VII and not the Equal Pay Act, these instructions should not be used.

Employment Cases - Equal Pay Act (EPA)

5.31 EQUAL PAY ACT – ESSENTIAL ELEMENTS

Your verdict must be for the plaintiff [and against defendant _____][1] [on the plaintiff's Equal Pay Act claim][2] if all of the following elements have been proved[3]:

First, the defendant employed the plaintiff and one or more members of the opposite sex in positions requiring substantially equal skill, effort, and responsibility; and

Second, the plaintiff and one or more members of the opposite sex performed their positions under similar working conditions; and

Third, the plaintiff was paid a lower wage than [the][4] member[s][4] of the opposite sex who [(was) (were)][4] performing substantially equal work under similar working conditions.

If any of the above elements has not been proved, or if it has been proved that the difference in pay was based on (describe affirmative defense(s) raised by the evidence) in Instruction ___,[5] your verdict must be for the defendant and you need not proceed further in considering this claim.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Use this phrase if there are multiple claims.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. Select the proper singular or plural form.

5. Insert number for Instruction 5.33.

Committee Comments

To establish a violation under the Act, a plaintiff must prove that the defendant paid different wages to employees of different sexes for "equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions." *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 669 (8th Cir. 1992) (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974)); *see Hunt v. Nebraska Pub. Power Dist.*, 282 F.3d 1021, 1029 (8th Cir. 2002) (holding the plaintiff must prove that (1) he or she was paid less than one or more members of the opposite sex employed in the same establishment, (2) for equal work on jobs requiring equal skill, effort, and responsibility, (3) which were performed under similar working conditions).

Once the plaintiff has met his or her burden, the employer may avoid liability only by proving that the disparity in pay was based on a bona fide seniority system, a merit system, a system which measures earnings by quantity or quality of production, any other factor other than sex. *See Hutchins v. Int'l Bhd. of Teamsters*, 177 F.3d 1076, 1081 (8th Cir. 1999).

5.32 EQUAL PAY ACT – DEFINITION: "SUBSTANTIALLY EQUAL"

"Substantially equal" means equal or nearly equal in the essential aspects of the job. In considering whether two jobs are substantially equal, you should compare the skill, effort, and responsibility required in performing the jobs. You should consider the actual job requirements, as opposed to job classifications, job descriptions, or job titles. In addition, you should consider the jobs overall, as opposed to individual segments of the jobs. You may disregard any superficial differences required to perform the jobs.

Committee Comments

Determining whether two jobs are substantially equal requires "practical judgment on the basis of all the facts and circumstances of a particular case." *Buettner v. Arch Coal Sales Co., Inc.*, 216 F.3d 707, 719 (8th Cir. 2000). A plaintiff is not required to show that the jobs are identical. *See Ridgway v. United Hospitals-Miller Division*, 563 F.2d 923, 926 (8th Cir. 1977); *Orahood v. Board of Trustees of the Univ. of Arkansas*, 645 F.2d 651, 654 (8th Cir. 1981). Comparability, however, is not enough. *See Christopher v. Iowa*, 559 F.2d 1135, 1138 (8th Cir. 1977). The inquiry centers around "whether the performance of the jobs requires substantially equal skill, effort and responsibility under similar working conditions." *Orahood*, 645 F.2d at 654. This may involve a comparison of the seniority and background experience of the employees performing the jobs, *see Buettner*, 216 F.3d at 719, and a comparison of the predecessor and successor employees to the jobs (both immediate and non-immediate), *see Broadus v. O.K. Indus.*, 226 F.3d 937, 942 (8th Cir. 2000). The actual job requirements and performance, as opposed to the job classifications or titles, are to be considered. *See Hunt v. Nebraska Pub. Power Dist.*, 282 F.3d 1021, 1029 (8th Cir. 2002) (citing *Orahood*, 645 F.2d at 654). Moreover, the overall jobs, and not merely the individual segments of the jobs, are to be considered. *See Broadus*, 226 F.3d at 942. Two jobs requiring an insubstantial or minor difference in the degree or amount of skill, or effort, or responsibility may be "substantially equal." *See Hunt*, 282 F.3d at 1030.

Employment Cases - Equal Pay Act (EPA)

5.33 EQUAL PAY ACT – AFFIRMATIVE DEFENSES[1]

Your verdict must be for the defendant if it has been proved[2] that the difference in pay was the result of:

(1) a bona fide seniority system; or

(2) a merit system; or

(3) a system that measures earnings by quantity or quality of production; or

(4) [any factor other than sex].[3]

Notes on Use

1. This instruction should be used when the defendant is submitting an affirmative defense. It should be tailored to include only those affirmative defenses asserted.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. Insert language that describes the factor other than sex upon which the defendant relies (e.g., "job performance," "education," or "experience").

Committee Comments

The Equal Pay Act specifically provides that a defendant is not liable under the Act when a disparity in pay between males and females is based on (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any factor other than sex. *See* 29 U.S.C. § 206(d)(1).

Seniority system. "A bona fide seniority system is a valid defense to the application of different standards of compensation." *Wood v. Southwestern Bell*, 637 F.2d 1188, 1193 (8th Cir. 1981) (Title VII case). It is proper to give a jury instruction defining a valid seniority system as simply a "bona fide seniority system," as opposed to defining the specific seniority system involved. *See Bjerke v. Nash Finch Co.*, No. Civ. A3-98-134, 2000 WL 33146937, at *3 (D. N.D. Dec. 4, 2000).

Merit system. If a plaintiff's salary is marginally different from comparable employees and legitimate factors are used to base salary differentials after evaluations, there is no violation of the Equal Pay Act. *See Brousard-Norcross v. Augustana College Ass'n*, 935 F.2d 974, 979 (8th Cir. 1991).

System which measures earnings by quantity or quality of production. "There is no discrimination if two employees receive the same pay rate, but one receives more total compensation because he or she produces more." *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1029 (6th Cir. 1983). Similarly, an employee who generates more profits for the employer can be paid more than an employee of the opposite sex. *See, e.g., Hodgson v. Robert Hall Clothes,*

Inc., 473 F.2d 589, 597 (3rd Cir. 1973) (employer demonstrated salespersons in men's clothing department generated more profits than those in women's clothing department).

Factor other than sex. The Equal Pay Act's broad exemption for employers who pay different wages to different sexes based upon any "factor other than sex" indicates that the Act is intended to address the same kind of "purposeful gender discrimination" prohibited by the Constitution. *See Varner v. Illinois State Univ.*, 226 F.3d 927, 934 (7th Cir. 2000). The broad exemption allows an employer to provide a neutral explanation for a disparity in pay. *See id.*

A difference in the job performance between a male and female employee in the same position can be a "factor other than sex" sufficient to justify a disparity in pay. *See EEOC v. Cherry-Burrell Corp.*, 35 F.3d 356, 362 (8th Cir. 1994) ("[P]erforming 'similar' duties does not bring about an inference that all Buyers did 'identical' work or even that objectively measured, they performed the Buyer's role equally."). Education or experience may be factors sufficient to justify a disparity in pay. *See Hutchins v. Int'l Bhd. of Teamsters*, 177 F.3d 1076, 1081 (8th Cir. 1999); *Clymore v. Far-Mar-Co., Inc.*, 709 F.2d 499, 503 (8th Cir. 1983). An employer's salary retention policy, maintaining a skilled employee's salary upon temporary change of position, may be a factor "other than sex" that justifies a salary differential. *Taylor v. White*, 321 F.3d 710, 720 (8th Cir. 2003). Reliance on prior salary may be a factor "other than sex" under appropriate circumstances. *Id. Cf. Drum v. Lesson Elec. Corp.*, 565 F.3d 1071 (8th Cir. 2009) (prior salary must not be based on prohibited "market force theory").

Payment of different wages because an employee of one sex is more likely to enter into "management training programs," however, is not a valid justification, where such programs appear to be available to only one sex. *See Hodgson v. Security National Bank of Sioux City*, 460 F.2d 57, 61 (8th Cir. 1972). Unequal wages due to alleged employee "flexibility" necessitates an inquiry into the frequency and the manner in which the additional flexibility is actually utilized. *See Peltier v. City of Fargo*, 533 F.2d 374, 377 (8th Cir. 1976).

If an employer has a legitimate fiscal reason, such as letting an employee work overtime instead of calling in a new employee to complete the additional duties, a wage differential to compensate for the overtime worked is justifiable. *See Fyfe v. Fort Wayne*, 241 F.3d 597, 600-01 (7th Cir. 2001). Additionally, paying an employee more in order to avoid harming the public, such as paying an employee overtime for spraying a greenhouse with harmful pesticides after hours instead of during normal working hours, is allowable. *See id.*

Employment Cases - Equal Pay Act (EPA)

5.34 EQUAL PAY ACT – ACTUAL DAMAGES

If you find in favor of the plaintiff under Instruction ___,[1] [and you find against the defendant in Instruction ___,[2]][3] you must award the plaintiff such sum as you find will compensate the plaintiff for the difference between what the plaintiff was paid and what [the][4] member[s][4] of the opposite sex [(was) (were)][4] paid.

The verdict form will give you further guidance on this issue. [Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture, and you must not award damages by way of punishment or through sympathy.][5]

Notes on Use

1. Insert the number of the Instruction setting forth the essential elements for the plaintiff's claim.

2. Insert the number of the Instruction setting forth the affirmative defenses.

3. This language should be used when the defendant is submitting an affirmative defense.

4. Select the proper singular or plural form.

6. This paragraph may be given at the trial court's discretion.

Committee Comments

Employees who bring a successful Equal Pay Act claim are entitled to compensatory damages, usually composed of back wages and liquidated damages. *See Broadus v. O.K. Indus.*, 226 F.3d 937, 943 (8th Cir. 2000). The term "liquidated damages" is "'something of a misnomer' because it is not a sum certain amount determined in advance, rather it is 'a means of compensating employees for losses they might suffer by reason of not receiving their lawful wage at the time it was due.'" *Id.* (quoting *Reich v. Southern New England Telecommunications*, 121 F.3d 58, 70 n.4 (2d Cir. 1997)). Liquidated damages are awarded in an amount equal to the amount of back wages, *see* 29 U.S.C. § 216(b), unless the court finds in its discretion that the employer acted "in good faith and had reasonable grounds for believing that his act or omission was in violation of the [FLSA]." 29 U.S.C. § 260. Where the court finds the employer acted in good faith, it may "award no liquidated damages or award any amount thereof not to exceed the amount specified in [29 U.S.C. § 216]." *Id.* There is no need to instruct the jury on the issue of liquidated damages, as the amount is simply double the amount awarded for unpaid wages. "The burden is on the employer to show that the violation was in good faith." *See Broadus*, 226 F.3d at 944.

Back wages are normally limited to two years but may be extended to three years for a willful violation. *See* 29 U.S.C. § 255(a); *see also Redman v. U.S. West Bus. Res., Inc.*, 153 F.3d

691, 695 (8th Cir. 1998) ("[A]ll claims for violations of the FLSA must be 'commenced within two years after the cause of action accrued,' unless the violation was 'willful.'") (quoting 29 U.S.C. § 255(a)); *Clark v. Eagle Food Ctrs., Inc.*, No. 95-3459, 105 F.3d 662, 1997 WL 6145 at *2 (8th Cir. Jan. 9, 1997) ("Equal Pay Act provides two-year limitations period from filing of complaint or three-year limitations period if willful violation proven."). The word "willful" generally refers to conduct that is not merely negligent. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). Willfulness is established if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute. *Id.* The question of willfulness is a question for the jury. *See Broadus*, 226 F.3d at 944. The jury's decision on "willfulness" is distinct from the district judge's decision to award liquidated damages. *See id.*

Title VII awards may subsume part or all of Equal Pay Act claims. *See EEOC v. Cherry-Burrell Corp.*, 35 F.3d 356, 358 (8th Cir. 1994). "[A plaintiff] is entitled only to one compensatory damage award if liability is found on any or all of the theories involved." *Id.* (quoting *Greenwood Ranches, Inc. v. Skie Constr. Co.*, 629 F.2d 518, 521 (8th Cir. 1980)).

5.35 EQUAL PAY ACT - VERDICT FORM

VERDICT

Note: Complete the following paragraph by writing in the name required by your verdict.

1. On the [Equal Pay Act][1] claim of plaintiff [_____][2] against defendant [_____],[3] we find in favor of:

_____

(Plaintiff Jane Doe) or (Defendant XYZ, Inc.)

Note: Answer question 2 only if the above finding is in favor of plaintiff [_____][2]. If the above finding is in favor of defendant [_____],[3] have your foreperson sign and date the form because you have completed your deliberations on this claim.

[2. Has it been proved[4] that the defendant either knew it was violating the Equal Pay Act or acted with reckless disregard of the Equal Pay Act?

_____ Yes _____ No

Note: If you answered yes to question 2, you should award damages based on the wages the plaintiff earned from [____ to _____].[5] If you answered no to question 2, you should award damages based on the wages the plaintiff earned from [____ to _____].[6]][7]

3. We find that the plaintiff should be awarded damages in the amount of:

$_____.

_____

Foreperson

Dated: _____

Employment Cases - Equal Pay Act (EPA)

Notes on Use

1. This phrase should be used when the plaintiff submits multiple claims to the jury.

2. Insert the name of the plaintiff.

3. Insert the name of the defendant.

4. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

5. Insert the date on which the plaintiff's cause of action accrued, or the date three years prior to the date on which the plaintiff filed his or her complaint, whichever is later. Insert the date the instructions are submitted to the jury as the final date.

6. Insert the date on which the plaintiff's cause of action accrued, or the date two years prior to the date on which the plaintiff filed his or her complaint, whichever is later. Insert the date the instructions are submitted to the jury as the final date.

7. This question is used when the parties dispute the "wilfulness" of the defendant's actions. When the parties do not dispute "wilfulness," question 2 may be eliminated. Question 3 should become question 2 with the following recommended language:

> Based on the wages the plaintiff earned from _____ to _____, we find that the plaintiff should be awarded damages in the amount of:
>
> $_____.

5.40 HARASSMENT CASES UNDER TITLE VII, SECTIONS 1981 AND 1983, ADA AND ADEA - Introductory Comment

The following instructions are designed for use in harassment cases. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986), the United States Supreme Court held that sexual harassment is "a form of sex discrimination prohibited by Title VII." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). *See also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Tuggle v. Mangan*, 348 F.3d 714 (8th Cir. 2003); *Duncan v. General Motors Corp.*, 300 F.3d 928 (8th Cir. 2002). Same-sex sexual harassment is also actionable under Title VII. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). Harassment on the basis of race, color, national origin, religion, age and disability is actionable if it involves a hostile working environment. Harassment on the basis of sex, race, color, national origin or religion is prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). *See, e.g., Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862 (8th Cir. 1999) (Title VII). Harassment on the basis of age is prohibited by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 623(a)(1), 631(a). *See, e.g.*, *Williams v. City of Kansas City, MO*, 223 F.3d 749 (8th Cir. 2000); *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151 (8th Cir. 1999) (ADEA). Harassment cases can also be brought under 42 U.S.C. § 1981, *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041 (8th Cir. 2002) (race and 1981); and under 42 U.S.C. § 1983, *Moring v. Arkansas Dep't of Corr.*, 243 F.3d 452 (8th Cir. 2001 (sex and 1983). Harassment on the basis of disability under the Americans with Disabilities Act (ADA) is actionable. *Shaver v. Independent Stave Co.*, 350 F.3d 716 (8th Cir. 2003).

According to guidelines promulgated by the Equal Employment Opportunity Commission (EEOC), sexual harassment includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 29 C.F.R. § 1604.11(a). Two theories of sexual harassment have been recognized by the courts--"quid pro quo" and "hostile work environment" harassment. Those cases in which the plaintiff claims that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands are generally referred to as "quid pro quo" cases, as distinguished from cases based on "bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." *See Burlington Indus.*, 524 U.S. at 751.

The Supreme Court has stated that the "quid pro quo" and "hostile work environment" labels are not controlling for purposes of establishing employer liability. However, the terms--to the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general--are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII. *See Burlington Indus.*, 524 U.S. at 752; *accord Newton v. Cadwell Lab.*, 156 F.3d 880, 883 (8th Cir. 1998) (recognizing Supreme Court's statement that "quid pro quo" and "hostile work environment" labels are no longer controlling for purposes of establishing employer liability).

In *Faragher* and *Burlington Industries*, the Supreme Court held that employers are vicariously liable for the discriminatory actions of their supervisory personnel. *Faragher*, 524 U.S. at 777-78; *Burlington Indus.*, 524 U.S. at 744; *accord Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757, 762 (8th Cir. 1998) (citing *Faragher* and *Burlington Industries*). To establish

liability, however, the Supreme Court differentiated between cases in which an employee suffers an adverse "tangible employment action" as a result of the supervisor's harassment and those cases in which an employee does not suffer a tangible employment action, but suffers the intangible harm flowing from the indignity and humiliation of sexual harassment. *See Newton*, 156 F.3d at 883 (recognizing distinction between cases in which harassment results in a tangible employment action and cases in which no tangible employment action occurs).

When an employee suffers a tangible employment action resulting from a supervisor's harassment the employer's liability is established by proof of harassment and the resulting adverse tangible employment action taken by the supervisor. *See Faragher*, 524 U.S. at 805-07; *Burlington Indus.*, 524 U.S. at 763. *See also Newton*, 156 F.3d at 883. No affirmative defense, as described below, is available to the employer in those cases. *See Phillips v. Taco Bell Corp.*, 156 F.3d 884, 889 n.6 (8th Cir. 1998) (citing *Faragher*, 524 U.S. 775; *Burlington Indus*., 524 U.S. at 763. A constructive discharge is a tangible employment action. *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004).

In cases where no tangible employment action has been taken by the supervisor, the defending employer may interpose an affirmative defense to defeat liability or damages. That affirmative defense "comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any illegal harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at 765, 118 S. Ct. at 2270. *See also Taco Bell*, 156 F.3d at 887-88 (quoting *Faragher* and *Burlington Industries*); *Rorie*, 151 F.3d at 762 (quoting same). Both elements may not always be required. *See McCurdy v. Arkansas State Police*, 375 F.3d 762 (8th Cir. 2004). This Title VII analysis has generally been applied in other areas. *See, e.g., Knutson v. Brownstein*, 87 F.E.P.C., 1771, 2001 WL 1661929 (S.D.N.Y. Dec. 27, 2001) (ADEA harassment - affirmative defense.)

Whether an individual is a "supervisor" for purposes of vicarious liability under *Faragher* and *Burlington Industries* may be a contested issue. *See, e.g., Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1057 (8th Cir. 2004) (supervisor "must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties"). *See also Joens v. John Morrell & Co.*, 354 F.3d 938 (8th Cir. 2004).

In light of the new guidance from the Supreme Court, the Committee has drafted instructions for use in three types of cases: (1) those cases in which the plaintiff alleges that he or she suffered a tangible employment action resulting from a refusal to submit to a supervisor's sexual demands (Model Instruction 5.41, *infra*); (2) those cases in which the plaintiff did not suffer any tangible employment action, but claims that he or she was subjected to illegal harassment by a supervisor sufficiently severe or pervasive to create a hostile working environment (Model Instruction 5.42, *infra*); and (3) those cases in which the plaintiff did not suffer any tangible employment action, but claims that he or she was subjected to illegal

harassment by non-supervisors sufficiently severe or pervasive to create a hostile working environment (Model Instruction 5.43, *infra*).

5.41 HARASSMENT (By Supervisor With Tangible Employment Action) Essential Elements

Your verdict must be for the plaintiff [and against defendant _____][1] on the plaintiff's claim of sexual harassment if all of the following elements have been proved[2]:

First, the plaintiff was subjected to (describe alleged conduct giving rise to the plaintiff's claim)[3]; and

Second, such conduct was unwelcome[4]; and

Third, such conduct was based on the plaintiff's [(sex) (gender)][5]; and

Fourth, the defendant (specify action(s) taken with respect to the plaintiff)[6]; and

Fifth, the plaintiff's [(rejection of) (failure to submit to)][7] such conduct [was a motivating factor][8] [played a part][9] in the decision to (specify action(s) taken with respect to the plaintiff).

If any of the above elements has not been proved, your verdict must be for the defendant and you need not proceed further in considering this claim.[10] [You may find that the plaintiff's [(rejection of) (failure to submit to)] such conduct [was a motivating factor] [played a part] in the defendant's (decision)[11] if it has been proved the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.][12]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. The conduct or conditions forming the basis for the plaintiff's sexual harassment claim (e.g., requests for sexual relations by his or her supervisor) should be described here. Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216 (8th Cir. 1997). It is appropriate to focus the jury's attention on the essential or ultimate facts which the plaintiff contends constitutes the conditions which make the environment hostile. Open-ended words such as "etc." should be avoided. Commenting on the evidence, for example, by telling the jury that certain evidence should be considered with caution, or suggesting the judge does believe or does not believe, or is skeptical about some evidence is inadvisable. A brief listing of the essential facts or circumstances which the plaintiff must prove is not normally deemed to be a comment on the evidence. Placing undue emphasis on a particular theory of the plaintiff's or

the defendant's case should also be avoided. *See Tyler v. Hot Springs Sch. Dist. No. 6*, 827 F.2d 1227, 1231 (8th Cir. 1987).

4. If the court wants to define this term, the following should be considered: "Conduct is 'unwelcome' if the plaintiff did not solicit or invite the conduct and regarded the conduct as undesirable or offensive." This definition is taken from *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986).

5. Because quid pro quo harassment usually involves conduct that is clearly sexual in nature, this element ordinarily may be omitted from the instruction. If it is based on something else, this sentence must be modified.

6. Insert the appropriate language depending on the nature of the case (*e.g.*, "discharged," "failed to hire," "failed to promote," or "demoted"). Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

7. This instruction is designed for use in sexual harassment cases where the plaintiff alleges that he or she suffered a tangible employment action resulting from a refusal to submit to a supervisor's sexual demands. If the plaintiff submitted to the supervisor's sexual advances, and the court allows the plaintiff to pursue such a claim under this instruction rather than requiring the plaintiff to submit such a claim under Model Instruction 5.42, *infra*, this instruction must be modified or, alternatively, the trial court may use special interrogatories to build a record on all of the potentially dispositive issues. *See, e.g., Karibian v. Columbia University*, 14 F.3d 773, 778 (2d Cir. 1994).

8. Most, if not all of these cases will arise under Title VII. "Motivating factor" is the correct phrase to use in all Title VII harassment cases. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). The substantive law in other areas should be consulted concerning the proper term to be used in such cases. The Committee recommends that the definition of "motivating factor" set forth in Model Instruction 5.96, *infra*, be given.

9. *See infra* Model Instruction 5.96, which defines "motivating factor" in terms of whether the characteristic "played a part or a role" in the defendant's decision. The phrase "motivating factor" need not be defined if the definition itself is used in the element instruction.

10. Because this instruction is designed for use in cases in which tangible employment action has been taken, the plaintiff's claim may be analyzed under the "motivating factor/same decision" format used in other Title VII cases. *See supra* Model Instruction 5.01A. For damages instructions and a verdict form, Model Instructions 5.02A through 5.03, *supra*, may be used.

11. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

12. This sentence may be added, if appropriate. *See infra* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states

"[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

This instruction is designed primarily for use in sexual harassment cases where the plaintiff alleges that he or she suffered a tangible employment action resulting from a refusal to submit to a supervisor's sexual demands. When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms or conditions of employment that is actionable under Title VII. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753 (1998). These cases (i.e., cases based on threats which are carried out) are "referred to often as quid pro quo cases, as distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment." *Id.* at 751.

The "Unwelcome" Requirement

In sexual harassment cases, the offending conduct must be "unwelcome." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986). In the Eighth Circuit, "conduct must be 'unwelcome' in the sense that the employee did not solicit or invite it, and the employee regarded the conduct as undesirable or offensive." *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986); *see also Burns v. McGregor Elec. Indus., Inc. [Burns I]*, 955 F.2d 559, 565 (8th Cir. 1992). In the typical quid pro quo case, where the plaintiff asserts a causal connection between a refusal to submit to sexual advances and a tangible employment action, the "unwelcome" requirement will be met if the jury finds that the plaintiff in fact refused to submit to a supervisor's sexual advances. However, if the court allows a plaintiff to pursue a quid pro quo claim despite his or her submission to the supervisor's sexual advances, the "unwelcome" element is likely to be disputed and must be included.

Conduct Based on Sex

In general, the plaintiff must establish that harassment was "based on sex" in order to prevail on a sexual harassment claim. *See, e.g., Burns v. McGregor Elec. Indus., Inc. [Burns II]*, 989 F.2d 959, 964 (8th Cir. 1993). Because quid pro quo harassment involves behavior that is sexual in nature, there typically will not be a dispute as to whether the objectionable behavior was based on sex. As the Eighth Circuit has stated, "sexual behavior directed at a woman raises the inference that the harassment is based on her sex." *Burns I*, 955 F.2d 559, 564 (8th Cir. 1992).

The Supreme Court has ruled that same-sex sexual harassment is actionable under Title VII. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S.75 (1998); *accord Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996); *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996).

Employment Cases - Harassment under Title VII, §§ 1981 & 1983, ADA & ADEA

Employer Liability

As noted in the Introductory Comment, the Supreme Court has held that an employer is "vicariously liable" when its supervisor's discriminatory act results in a tangible employment action. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S. Ct. 2257, 2269 (1998) ("A tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer."). No affirmative defense is available is such cases. *Id*. at 2270.

Tangible Employment Action

According to the Supreme Court, a "tangible employment action" for purposes of the vicarious liability issue means "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (citations omitted). In most cases, a tangible employment action "inflicts direct economic harm." *Id.* at 762.

5.42 HARASSMENT (By Supervisor With No Tangible Employment Action) Essential Elements

Your verdict must be for the plaintiff [and against defendant _____][1] on the plaintiff's claim of [sex/gender] [racial] [color] [national origin] [religious] [age] [disability] harassment if all of the following elements have been proved[2]:

First, the plaintiff was subjected to (describe alleged conduct or conditions giving rise to the plaintiff's claim)[3]; and

Second, such conduct was unwelcome[4]; and

Third, such conduct was based on the plaintiff's [(sex/gender) (race) (color) (national origin) (religion) (age) (disability)][5]; and

Fourth, such conduct was sufficiently severe or pervasive that a reasonable person in the plaintiff's position would find the plaintiff's work environment to be [(hostile) (abusive)][6]; and

Fifth, at the time such conduct occurred and as a result of such conduct, the plaintiff believed [(his) (her)] work environment to be [(hostile) (abusive)].

If any of the above elements has not been proved, [or if the defendant is entitled to a verdict under Instruction ____,][7] your verdict must be for the defendant and you need not proceed further in considering this claim.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. The conduct or conditions forming the basis for the plaintiff's harassment claim should be described here. Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216 (8th Cir. 1997). It is appropriate to focus the jury's attention on the essential or ultimate facts which the plaintiff contends constitutes the conditions which make the environment hostile. Open-ended words such as "etc." should be avoided. Commenting on the evidence, for example, by telling the jury that certain evidence should be considered with caution, or suggesting the judge does believe or does not believe, or is skeptical about some evidence is inadvisable. A brief listing of the essential facts or circumstances which the plaintiff must prove is not normally deemed to be a comment on the evidence. Placing undue emphasis

on a particular theory of the plaintiff's or the defendant's case should also be avoided. *See Tyler v. Hot Springs Sch. Dist. No. 6*, 827 F.2d 1227, 1231 (8th Cir. 1987).

4. The term "unwelcome" may be of such common usage that it need not be defined. If the court wants to define this term, the following should be considered: "Conduct is 'unwelcome' if the plaintiff did not solicit or invite the conduct and regarded the conduct as undesirable or offensive." This definition is taken from *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986).

5. As noted in the Committee Comments, there are a number of subsidiary issues which can arise in connection with the requirement that actionable harassment must be "based on sex" or other prohibited category. If the allegedly offensive conduct clearly was directed at the plaintiff because of his or her gender, age or race, it is not necessary to include this element. However, if there is a dispute as to whether the offensive conduct was discriminatory--for example, if the offending conduct may have been equally abusive to both men and women or if men and women participated equally in creating a "raunchy workplace"--it may be necessary to modify this element to properly frame the issue.

6. Select the word which best describes the plaintiff's theory. Both words may be appropriate. This element sets forth the "objective test" for a hostile work environment. As discussed in the Committee Comments, it is the Committee's position that the appropriate perspective is that of a "reasonable person." In addition, it may be appropriate to include the factors set forth in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993), and reiterated in *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88, 118 S. Ct. 2275, 2283 (1998), to aid in determining whether a plaintiff's work environment was hostile or abusive. For example:

> In determining whether a reasonable person in the plaintiff's circumstances would find the plaintiff's work environment to be hostile or abusive, you must look at all the circumstances. The circumstances may include the frequency of the conduct complained of; its severity; whether it was physically threatening or humiliating, or merely offensive; whether it unreasonably interfered with the plaintiff's work performance; and the effect on the plaintiff's psychological well-being. No single factor is required in order to find a work environment hostile or abusive.

7. Because this instruction is designed for cases in which no tangible employment action is taken, the defendant may defend against liability or damages by proving an affirmative defense "of reasonable oversight and of the employee's unreasonable failure to take advantage of corrective opportunities." *Nichols v. American Nat'l Ins. Co.*, 154 F.3d 875, 887 (8th Cir. 1998) (citing *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at 765, 118 S. Ct. at 2270). The bracketed language should be used when the defendant is submitting the affirmative defense. *See infra* Model Instruction 5.42A.

Employment Cases - Harassment under Title VII, §§ 1981 & 1983, ADA & ADEA

Committee Comments

This instruction is designed for use in harassment cases where the plaintiff did not suffer any "tangible" employment action such as discharge or demotion, but rather suffered "intangible" harm flowing from a supervisor's harassment that is "sufficiently severe or pervasive to create a hostile work environment." *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742,751 (1998).

It is impossible to compile an exhaustive list of the types of conduct that may give rise to a hostile environment harassment claim under Title VII and other statutes. Some examples of this kind of conduct include: verbal abuse of a sexual, racial or religious nature; graphic verbal commentaries about an individual's body, sexual prowess, or sexual deficiencies; or age; sexually degrading or vulgar words to describe an individual; pinching, groping, and fondling; suggestive, insulting, or obscene comments or gestures; the display in the workplace of sexually suggestive objects, pictures, posters or cartoons; asking questions about sexual conduct; and unwelcome sexual advances. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316 (8th Cir. 1994); *Hukkanen v. International Union of Operating Eng'rs Local No. 101*, 3 F.3d 281 (8th Cir. 1993); *Burns v. McGregor Elec. Indus., Inc. [Burns II]*, 989 F.2d 959 (8th Cir. 1993); *Burns v. McGregor Elec. Indus., Inc. [Burns I]*, 955 F.2d 559 (8th Cir. 1992); *Jones v. Wesco Invs., Inc*., 846 F.2d 1154 (8th Cir. 1988); *Hall v. Gus Constr. Co.,* 842 F.2d 1010 (8th Cir. 1988).

Conduct Based on Sex or Gender

In general, in a sex discrimination case, the plaintiff must establish that the alleged offensive conduct was "based on sex." *Burns II*, 989 F.2d at 964. Despite its apparent simplicity, this requirement raises a host of interesting issues. For example, in an historically male-dominated work environment, it may be commonplace to have sexually suggestive calendars on display and provocative banter among the male employees. While the continuation of this conduct may not be directed at a new female employee, it nevertheless may be actionable on the theory that sexual behavior at work raises an inference of discrimination against women. *See Burns I*, 955 F.2d at 564; *see also Stacks v. Southwestern Bell*, 27 F.3d 1316 (8th Cir. 1994) (sexual conduct directed by male employees toward women other than the plaintiff was considered part of a hostile work environment).

The Eighth Circuit also has indicated that conduct which is not sexual in nature but is directed at a woman because of her gender can form the basis of a hostile environment claim. *See, e.g., Gillming v. Simmons Indus.*, 91 F.3d 1168, 1171 (8th Cir. 1996) (jury instruction need not require a finding that acts were explicitly sexual in nature); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (calling a female employee "herpes" and urinating in her gas tank, although not conduct of an explicit sexual nature, was properly considered in determining if a hostile work environment existed); *see also Stacks*, 27 F.3d at 1326 (differential treatment based on gender in connection with disciplinary action supported a female employee's hostile work environment claim); *Shope v. Board of Sup'rs*, 14 F.3d 596 (table), 1993 WL 525598 (4th Cir.

Dec. 20, 1993) (rude, disparaging, and "almost physically abusive" conduct based on gender supported a hostile environment claim).

The Eighth Circuit has not directly addressed the issue of whether vulgar or abusive conduct that is directed equally toward men and women can constitute a violation of Title VII. Because sexual harassment is a variety of sex discrimination, some courts have suggested that it is not a violation of Title VII if a manager is equally abusive to male and female employees. For example, in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), *abrogated on other grounds*, 510 U.S. 178 (1993), the court suggested that sexual harassment of all employees by a bisexual supervisor would not violate Title VII. In a similar vein, the district court in *Kopp v. Samaritan Health System, Inc.*, 13 F.3d 264 (8th Cir. 1993), granted the employer's motion for summary judgment on the theory that the offending supervisor was abusive toward all employees. Although the Eighth Circuit reversed because the plaintiff had offered evidence that the abuse directed toward female employees was more frequent and more severe than the abuse directed at male employees, *Kopp* suggests that the "equal opportunity harassment" defense can present a question of fact for the jury. *But see Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334 (D. Wyo. 1993) (holding that "equal opportunity harassment" of employees of both genders can violate Title VII).

The Supreme Court has ruled that same-sex sexual harassment is actionable under Title VII. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *accord Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996); *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996). *See Pedroza v. Cintas Corporation No. 2*, 397 F.3d 1063 (8th Cir. 2005), for a discussion of the possible evidentiary routes for proving sexual harassment in same-sex cases.

Hostile or Abusive Environment

In order for hostile environment harassment to be actionable, it must be "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982))); *accord Parton v. GTE North, Inc.*, 971 F.2d 150, 154 (8th Cir. 1992); *Burns v. McGregor Elec. Indus., Inc. [Burns I]*, 955 F.2d 559, 564 (8th Cir. 1992); *Staton v. Maries County*, 868 F.2d 996, 998 (8th Cir. 1989); *Minteer v. Auger*, 844 F.2d 569 (8th Cir. 1988). In *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986), the court explained:

> The harassment must be "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." *Henson v. City of Dundee*, 682 F.2d at 904. The plaintiff must show a practice or pattern of harassment against her or him; a single incident or isolated incidents generally will not be sufficient. The plaintiff must generally show that the harassment is sustained and nontrivial.

Id. at 749-50; *see Faragher*, 524 U.S. at 788 ("'[S]imple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"). *Compare Henthorn v. Capitol Communications, Inc.*, No. 03-1018 (8th Cir. Mar. 5, 2004) *and Duncan v. General Motors Co.*, 300 F.3d 928, 933 (8th

Cir. 2002) *with Eich v. Board of Regents for Central Missouri State University*, 850 F.3d 752 (8th Cir. 2004).

"[I]n assessing the hostility of an environment, a court must look to the totality of the circumstances." *Stacks*, 27 F.3d at 1327 (citation omitted). In *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993), the Court held that a hostile environment claim may be actionable without a showing that the plaintiff suffered psychological injury. In determining whether an environment is hostile or abusive, the relevant factors include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Harris*, 510 U.S. at 23. *See also Faragher*, 524 U.S. at 787-88, 118 S. Ct. at 2283 (reiterating relevant factors set forth in *Harris*); *accord Phillips v. Taco Bell Corp.*, 156 F.3d 884, 889 (8th Cir. 1998) (citing *Harris*).

These same factors have generally been required in all types of harassment/hostile environment cases. *See supra* the cases cited in section 5.40.

Objective and Subjective Requirement

In *Harris,* the Supreme Court explained that "a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher*, 524 U.S. at 787 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993) ("[I]f the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.")); *accord Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757, 761 (8th Cir. 1998).

Employer Liability

As noted in the Introductory Comment, the Supreme Court has held that an employer is "subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Unlike those cases in which the plaintiff suffers a tangible employment action, however, in cases where no tangible employment action has been taken by the supervisor, the employer may raise an affirmative defense to liability or damages. *Id*. *See infra* Model Instruction 5.42A and Committee Comments.

5.42A AFFIRMATIVE DEFENSE
(For Use in Supervisor Cases With No Tangible Employment Action)

Your verdict must be for the defendant on the plaintiff's claim of harassment if it has been proved[1] that (a) defendant exercised reasonable care to prevent and correct promptly any harassing behavior; and (b) that the plaintiff unreasonably failed to take advantage of (specify the preventive or corrective opportunities provided by the defendant of which the plaintiff allegedly failed to take advantage or how the plaintiff allegedly failed to avoid harm otherwise).[2]

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. According to the Supreme Court, a defendant asserting this affirmative defense must prove not only that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, but also that "the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by defendant or to avoid harm otherwise." *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at 763. For purposes of instructing the jury, however, the Committee recommends that the specific preventive or corrective opportunities of which the plaintiff allegedly failed to take advantage or the particular manner in which the plaintiff allegedly failed to avoid harm be identified.

Committee Comments

The United States Supreme Court held that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by [the employee's] supervisor." *Rorie v. United Parcel Serv., Inc.*, 151 F.3d 757, 762 (8th Cir. 1998) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 745 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 777 (1998)). When "no tangible employment action, such as discharge, demotion, or undesirable reassignment" is taken, however, an employer may defend against liability or damages "by proving an affirmative defense of reasonable oversight and of the employee's unreasonable failure to take advantage of corrective opportunities." *Nichols v. American Nat'l Ins. Co.*, 154 F.3d 875, 887 (8th Cir. 1998) (citing *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at 763); *accord Phillips v. Taco Bell Corp.*, 156 F.3d 884, 888 (8th Cir. 1998) (citing same); *Newton v. Cadwell Laboratories*, 156 F.3d 880, 883 (8th Cir. 1998) (citing same). The language of the affirmative defense is taken verbatim from the Supreme Court's decisions in *Burlington Industries* and *Faragher*. Both elements may not always be required. *See McCurdy v. Arkansas State Police*, 375 F.3d 762 (8th Cir. 2004). Although no Eighth Circuit cases so hold, this affirmative defense has been held applicable to harassment claims made under ADEA, *Lacher v. West*, 147 F. Supp. 2d 538 (N.D. Tex. 2001); claims under the ADA, *Silk v. City of Chicago*, 194 F.3d 788 (7th Cir. 1999) (assumes harassment actionable under the ADA); under

42 U.S.C. § 1983; *Molnar v. Booth*, 229 F.3d 593 (7th Cir. 2000); and under 42 U.S.C. § 1981, *Jackson v. Quanex Corp.*, 191 F.3d 647 (6th Cir. 1999).

Employment Cases - Harassment under Title VII, §§ 1981 & 1983, ADA & ADEA

5.43 HARASSMENT (By Nonsupervisor) Essential Elements

Your verdict must be for the plaintiff [and against defendant _____][1] on the plaintiff's claim of [sex/gender] [racial] [color] [national origin] [religious] [age] [disability] harassment if all of the following elements have been proved[2]:

First, the plaintiff was subjected to (describe alleged conduct or conditions giving rise to the plaintiff's claim)[3]; and

Second, such conduct was unwelcome[4]; and

Third, such conduct was based on the plaintiff's [(sex/gender) (race) (color) (national origin) (religion) (age) (disability)][5]; and

Fourth, such conduct was sufficiently severe or pervasive that a reasonable person in the plaintiff's position would find the plaintiff's work environment to be [(hostile) (abusive)][6]; and

Fifth, at the time such conduct occurred and as a result of such conduct, the plaintiff believed [(his) (her)] work environment to be [(hostile) (abusive)]; and

Sixth, the defendant knew or should have known of the (describe alleged conduct or conditions giving rise to the plaintiff's claim)[7]; and

Seventh, the defendant failed to take prompt and appropriate corrective action to end the harassment.[8]

If any of the above elements has not been proved, your verdict must be for the defendant and you need not proceed further in considering this claim.[9]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. The conduct or conditions forming the basis for the plaintiff's harassment claim should be described here. Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1222 (8th Cir. 1997). It is appropriate to focus the jury's attention on the essential or ultimate facts which the plaintiff contends constitutes the conditions which make the environment hostile. Open-ended words such as "etc." should be avoided. Commenting on the evidence, for example, by telling the jury that certain evidence should be considered with

caution, or suggesting the judge does believe or does not believe, or is skeptical about some evidence is inadvisable. A brief listing of the essential facts or circumstances which the plaintiff must prove is not normally deemed to be a comment on the evidence. Placing undue emphasis on a particular theory of the plaintiff's or the defendant's case should also be avoided. *See Tyler v. Hot Springs Sch. Dist. No. 6*, 827 F.2d 1227, 1231 (8th Cir. 1987).

4. The term "unwelcome" may be of such common usage that it need not be defined. If the court wants to define this term, the following should be considered: "[Conduct is 'unwelcome'] if the employee did not solicit or invite it and the employee regarded the conduct as undesirable or offensive." This definition is taken from *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986).

5. As noted in the Committee Comments, there are a number of subsidiary issues which can arise in connection with the requirement that actionable harassment must be "based on sex" or other prohibited category. If the allegedly offensive conduct clearly was directed at the plaintiff because of his or her gender, age or race, it is not necessary to include this element. However, if there is a dispute as to whether the offensive conduct was discriminatory--for example, if the offending conduct may have been equally abusive to both men and women or if men and women participated equally in creating a "raunchy workplace"--it may be necessary to modify this element to properly frame the issue.

6. Select the word which best describes the plaintiff's theory. Both words may be appropriate. This element sets forth the "objective test" for a hostile work environment. As discussed in the Committee Comments, it is the Committee's position that the appropriate perspective is that of a "reasonable person." In addition, it may be appropriate to include the factors set forth in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993), and reiterated in *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998), to aid in determining whether a plaintiff's work environment was hostile or abusive. For example:

> In determining whether a reasonable person in the plaintiff's circumstances would find the plaintiff's work environment to be hostile or abusive, you must look at all the circumstances. The circumstances may include the frequency of the conduct complained of; its severity; whether it was physically threatening or humiliating, or merely offensive; whether it unreasonably interfered with the plaintiff's work performance; and the effect on plaintiff's psychological well-being. No single factor is required in order to find a work environment hostile or abusive.

7. As noted in the Committee Comments, there are generally two requirements for establishing employer liability in sexual harassment cases where the plaintiff claims harassment by his or her coworkers rather than by supervisory personnel: (1) the plaintiff must show that the employer knew or should have known of the harassment; and (2) the plaintiff must show that the employer failed to take appropriate action to end the harassment. This element sets forth the first half of the test. As a practical matter, it is unlikely that the defendant will seriously contest both issues: if the employer claims it never knew of the harassment, the question of whether its

response was appropriate would be moot; conversely, if the employer's primary defense is that it took appropriate remedial action, the "knew or should have known" element may be moot.

8. As discussed in the Introductory Comment, the Supreme Court's opinions with respect to employer liability in sexual harassment cases address only those situations in which a supervisor (as opposed to a non-supervisor) sexually harasses a subordinate. In cases in which the plaintiff alleges sexual harassment by a nonsupervisor, the issue of whether courts will leave the burden on the plaintiff to prove that the defendant failed to take prompt and appropriate corrective action or whether courts will place the burden on the defendant to prove an affirmative defense that it took prompt and appropriate corrective action as in *Faragher* and *Burlington Industries* is an open question. *See, e.g., Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1366 (11th Cir. 1999) (Barkett, concurring).

9. Because this instruction is designed for use in cases in which no tangible employment action has been taken, the plaintiff's claim should not be analyzed under the "motivating factor/same decision" format used in other Title VII cases. *See Stacks v. Southwestern Bell*, 27 F.3d 1316 (8th Cir. 1994). For damages instructions and a verdict form, Model Instructions 5.02A through 5.03, *supra*, should be used in a modified format. For a sample constructive discharge instruction, *see infra* Model Instruction 5.93.

Committee Comments

This instruction is designed for use in cases where the plaintiff did not suffer any tangible employment action, but claims that he or she was subjected to sexual or other harassment by non-supervisors (as opposed to supervisory personnel) sufficiently severe or pervasive to create a hostile working environment. In such cases (*i.e.*, cases not involving vicarious liability), "[e]mployees have some obligation to inform their employers, either directly or otherwise, of behavior that they find objectionable before employer can be held responsible for failing to correct that behavior, at least ordinarily." *Whitmore v. O'Connor Management, Inc.*, 156 F.3d 796, 800 (8th Cir. 1998) (decided after the Supreme Court's opinions in *Burlington Industries* and *Faragher*). Although no Eighth Circuit cases clearly decide this issue, the Committee believes it is likely the court will follow this approach in all harassment claims, not just in Title VII cases.

5.44A HARASSMENT - ACTUAL DAMAGES - Commentary

Actual damages for harassment are generally governed by the same statute which prohibits the discrimination itself. Thus,

5.02A should be reviewed for drafting an instruction dealing with actual damages in sexual harassment or other harassment cases under Title VII;

5.12A should be reviewed for drafting an instruction dealing with actual damages in age harassment cases under the ADEA;

5.22A should be reviewed for drafting an instruction dealing with actual damages in harassment cases under 42 U.S.C. § 1981;

5.27A should be reviewed for drafting an instruction dealing with actual damages in harassment cases under 42 U.S.C. § 1983;

5.54A should be reviewed for drafting an instruction dealing with actual damages in harassment cases under the ADA.

5.44B HARASSMENT - NOMINAL DAMAGES - Commentary

Nominal damages for harassment are generally governed by the same statute which prohibits the discrimination itself. Thus,

5.02B should be reviewed for drafting an instruction dealing with nominal damages in sexual harassment or other harassment cases under Title VII;

5.12B should be reviewed for drafting an instruction dealing with nominal damages in age harassment cases under the ADEA;

5.22B should be reviewed for drafting an instruction dealing with nominal damages in harassment cases under 42 U.S.C. § 1981;

5.27B should be reviewed for drafting an instruction dealing with nominal damages in harassment cases under 42 U.S.C. § 1983;

5.54B should be reviewed for drafting an instruction dealing with nominal damages in harassment cases under the ADA.

5.44C HARASSMENT - PUNITIVE DAMAGES - Commentary

Punitive damages for harassment are generally governed by the same statute which prohibits the discrimination itself. Thus,

5.02C should be reviewed for drafting an instruction dealing with punitive damages in sexual harassment or other harassment cases under Title VII;

5.12C should be reviewed for drafting an instruction dealing with liquidated damages in age harassment cases under the ADEA;

5.22C should be reviewed for drafting an instruction dealing with punitive damages in harassment cases under 42 U.S.C. § 1981;

5.27C should be reviewed for drafting an instruction dealing with punitive damages in harassment cases under 42 U.S.C. § 1983;

5.54C should be reviewed for drafting an instruction dealing with punitive damages in harassment cases under the ADA.

5.50 AMERICANS WITH DISABILITIES ACT ("ADA") (Employment Cases Only)
Introduction

The following instructions are designed for use in disability cases under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*

These instructions are not intended to cover cases with respect to public accommodations or public services under the ADA. Rather, these instructions are intended to cover only those cases arising under the employment provisions of the ADA. The ADA was amended significantly, effective January 1, 2009, by the ADA Amendments Act of 2008. Because the amendments are not retroactive, it may be necessary to consult the prior version of these instructions, included in the appendix, if a case involves claims arising prior to January 1, 2009.

To establish a prima facie case under the ADA, an aggrieved employee must establish that he or she has a disability as defined in 42 U.S.C. § 12102(2); that he or she is qualified to perform the essential functions of the job, with or without reasonable accommodation; and that he or she has suffered adverse employment action on the basis of disability. 42 U.S.C. § 12112(a).

A "Disability" Under the ADA

Under the ADA, a "disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). This definition "shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act." 42 U.S.C. § 12102(4)(A).

As amended, effective January 1, 2009, the ADA defines "major life activities" as including, but not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. 42 U.S.C. § 12102(2)(A). A "major life activity" also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions. 42 U.S.C. § 12102(2)(B).

"Physical or Mental Impairment"

An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. 42 U.S.C. § 12102(4)(C). An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. 42 U.S.C. §12102(4)(D). The ADA specifically directs that the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, such as:

I. medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

II. use of assistive technology;

III. reasonable accommodations or auxiliary aids or services (e.g., interpreters, readers, or acquisition or modification of devices);

IV. learned behavioral or adaptive neurological modifications.

42 U.S.C. § 12102(4)(E)(I).

"Being Regarded as Having Such an Impairment"

An individual meets the requirement of being regarded as having such an impairment "if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A). However, 42 U.S.C. § 12102(1)(C), the provision that includes "being regarded as having such an impairment" in the definition of disability, does not apply to impairments that are transitory (having an actual or expected duration of 6 months or less) and minor. 42 U.S.C. § 12102(3)(B).

Knowledge of the Disability

Unlike other discrimination cases, the protected characteristic of the employee in a disability discrimination case may not always be immediately obvious to the employer. As the Seventh Circuit has stated, "It is true that an employer will automatically know of many disabilities. For example, an employer would know that a person in a wheelchair, or with some other obvious physical limitation, had a disability." *Hedberg v. Indiana Bell Tele. Co.*, 47 F.3d 928, 932 (7th Cir. 1995). Furthermore, it may be that some symptoms are so obviously manifestations of an underlying disability that it would be reasonable to infer that an employer actually knew of the disability (*e.g.*, an employee who suffers frequent seizures at work likely has some disability). *Id.* at 934. Finally, an employer may actually know of disabilities that are not immediately obvious, such as when an employee asks for an accommodation under the ADA and submits supporting medical documentation. *See id.* at 932.

An employer's mere knowledge of the disability's effects, far removed from the disability itself and with no obvious link to the disability, is generally insufficient to create liability. As one court has aptly stated, "[t]he ADA does not require clairvoyance." *See id.* at 934.

A number of Eighth Circuit decisions suggest that an employer must have actual knowledge of an employee's disability before the employer may be exposed to liability. *See, e.g., Miller v. National Casualty Co.*, 61 F.3d 627, 629-30 (8th Cir. 1995) (employee's complaints of stress insufficient to put employer on notice of any disability when it had not been informed about a diagnosis of manic depression; to extent symptoms were known, they were not "so obviously manifestations of an underlying disability that it would be reasonable to infer that [her] employer actually knew of the disability" (quoting *Hedberg*, 47 F.3d at 934)); *Webb v. Mercy Hosp.*, 102 F.3d 958, 960 (8th Cir. 1996) (holding that the employer did not violate the ADA when it discharged a nurse who had a history of hospitalization for depression because there was no evidence that the employer knew of her diagnosis); *Hopper v. Hallmark Cards,*

Inc., 87 F.3d 983, 990 (8th Cir. 1996) (upholding summary judgment for the employer where the plaintiff concealed the severity of his disabling condition even though the employer had some awareness of the plaintiff's health problems).

A "Qualified" Individual with a Disability

In order to be protected by the ADA, an individual must be a "qualified individual with a disability." To be a qualified individual, one must be able to perform the essential functions of the job with or without reasonable accommodations. 42 U.S.C. § 12111(8); *see also Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1016 (8th Cir. 2000) (determination of qualification involves two-fold inquiry--whether the person meets the necessary prerequisites for the job, such as education, experience and training, and whether the individual can perform the essential job functions with or without reasonable accommodation); *Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 574-76 (8th Cir. 2000) (in order for court to assess whether the plaintiff is "qualified" within the meaning of the ADA, the plaintiff must identify particular job sought or desired).

Essential Functions of the Job

The phrase "essential functions" means the fundamental job duties of the employment position the plaintiff holds or for which the plaintiff has applied. *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 787 (8th Cir. 1998). "Essential functions" does not include the marginal functions of the position. *Id.* (citing 29 C.F.R. § 1630.2(n)(1)). The EEOC regulations suggest the following may be considered in determining the essential functions of an employment position: (1) The employer's judgment as to which functions of the job are essential; (2) written job descriptions prepared for advertising or used when interviewing applicants for the job; (3) the amount of time spent on the job performing the function in question; (4) consequences of not requiring the person to perform the function; (5) the terms of a collective bargaining agreement if one exists; (6) the work experience of persons who have held the job; and/or (7) the current work experience of persons in similar jobs. 29 C.F.R. § 1630.2(n)(3); *Moritz*, 147 F.3d at 787. *See also Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445-46 (8th Cir. 1998) ("An employer's identification of a position's "essential functions" is given some deference under the ADA."); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1113-14 (8th Cir. 1995) (discussing "essential functions" and relevant EEOC regulations); *Spangler v. Federal Home Loan Bank of Des Moines*, 278 F.3d 847, 850 (8th Cir. 2002) (employee's absenteeism prevented her from performing essential functions of job); *Dropinski v. Douglas County*, 298 F.3d 704, 708-09 (8th Cir. 2002) (employee who could not perform several of the functions of the written job description for an automatic equipment operator, including tasks entailing bending, twisting, squatting and lifting over fifty pounds, could not perform essential functions of the job); *Alexander v. The Northland Inn*, 321 F.3d 723, 727 (8th Cir. 2003) (vacuuming was an essential function of housekeeping supervisor position; the plaintiff, whose physician said she could do no vacuuming, was not a qualified individual); *Rehrs v. The Iams Co.*, 486 F.3d 353, 357 (8th Cir. 2007) (shift rotation was an essential function of plaintiff's job, where all technician positions were on rotating shifts). A temporary accommodation exempting an employee from certain job requirements does not demonstrate that those job functions are non-essential. *Id.* at 358.

Resolving a conflict among the courts of appeals, the United States Supreme Court held that an ADA plaintiff's application for or receipt of benefits under the Social Security Disability Insurance program neither automatically estops the plaintiff from pursuing his or her ADA claim nor erects a strong presumption against the plaintiff's success under the ADA. *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 797 (1999). Nonetheless, to survive a motion for summary judgment, the plaintiff must explain why his or her claim for disability benefits is consistent with the claim that he or she could perform the essential functions of his or her previous job with or without reasonable accommodation. *Id.*; *accord Hill v. Kansas City Area Transportation Authority*, 181 F.3d 891, 893 (8th Cir. 1999). *See also Lloyd v. Hardin County, Iowa*, 207 F.3d 1080, 1084-85 (8th Cir. 2000) (affirming grant of summary judgment to employer in part because the plaintiff failed to overcome presumption, created by prior allegation of total disability, that he or she is not a qualified individual within the meaning of the ADA); *Gilmore v. AT&T*, 319 F.3d 1042 (8th Cir. 2003) (affirming summary judgment for employer where the plaintiff failed to provide any evidence to reconcile her ADA claim with her assertion, in application for Social Security Disability, that she was unable to perform essential functions of her job).

"Reasonable Accommodation"

The ADA requires employers to make reasonable accommodations to allow disabled individuals to perform the essential functions of their positions. *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999). A refusal to provide a reasonable accommodation can amount to a constructive demotion. *See Fenney v. Dakota, Minnesota & Eastern Railroad Co.*, 327 F.3d 707, 717-18 (8th Cir. 2003).

Although there is no precise test for determining what constitutes a reasonable accommodation, the ADA does not require an accommodation "that would cause other employees to work harder, longer, or be deprived of opportunities." *Rehrs*, 486 F.3d at 357. An accommodation is unreasonable if it imposes undue financial or administrative burdens or if it otherwise imposes an undue hardship on the operation of the employer's business. 42 U.S.C. § 12112(b)(5)(A); *Buckles v. First Data Resources, Inc.*, 176 F.3d 1098, 1101 (8th Cir. 1999). The "undue hardship" defense is discussed below.

The ADA provides that the concept of "reasonable accommodation" may include: "(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications or examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9). *See also Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112-14 (8th Cir. 1995) (discussing "reasonable accommodations" and relevant EEOC regulations).

Although part-time work and job restructuring may be considered reasonable accommodations, "[t]his does not mean an employer is required to offer those accommodations in every case." *Treanor*, 200 F.3d at 575. Moreover, although job restructuring is a possible

accommodation under the ADA, an employer need not reallocate the essential functions of a job. *Id.*; *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 950 (8th Cir. 1999); *Lloyd*, 207 F.3d at 1084; *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 788 (8th Cir. 1998); *Benson*, 62 F.3d at 1112-13 (citing 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii)). In addition, an employer is not obligated to hire additional employees or reassign existing workers to assist an employee. *Fjellestad*, 188 F.3d at 950 (citing *Moritz*, 124 F.3d at 788).

Reassignment to a vacant position is another possible accommodation under the ADA. *Benson*, 62 F.3d at 1114 (citing 42 U.S.C. § 12111(9)(B)); 29 C.F.R. § 1630.2(o)(2)(ii)); *see also Fjellestad*, 188 F.3d at 950-51 (the plaintiff created genuine issue of material fact as to whether employer could have reassigned her to a specific, vacant position). In fact, the Eighth Circuit has recognized that, in certain circumstances, reassignment to a vacant position may be "necessary" as a reasonable accommodation. *See Cravens*, 214 F.3d at 1018. The scope of the reassignment duty is limited, however. *Id.* at 1019. For example, reassignment is an accommodation of "last resort"; that is, the "very prospect of reassignment does not even arise unless accommodation within the individual's current position would pose an undue hardship." *Id.* Moreover, the ADA does not require an employer to create a new position as an accommodation. *Id.*; *see also Treanor*, 200 F.3d at 575 ("[T]he ADA does not require an employer to create a new part-time position where none previously existed."); *Fjellestad*, 188 F.3d at 950 (employer not required to create new position or to create permanent position out of a temporary one). An employer who has an established policy of filling vacant positions with the most qualified applicant is not required to assign the vacant position to a disabled employee who, although qualified, is not the most qualified applicant. *Huber v. Wal-Mart Stores*, 486 F.3d 480, 483-84 (8th Cir. 2007). In addition, an employer is not required to "bump" another employee in order to reassign a disabled employee to that position. *Cravens*, 214 F.3d at 1019. Promotion is not required. *Id.* Finally, the employee must be "otherwise qualified" for the reassignment position. *Id.*

An employer is not obligated to provide an employee the accommodation he or she requests or prefers. *See, e.g., Cravens*, 214 F.3d at 1019. The employer need only provide some reasonable accommodation. *Hennenfent v. Mid Dakota Clinic, P.C.*, 164 F.3d 419, 422 n.2 (8th Cir. 1998); *accord Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1137 (8th Cir. 1999) ("If more than one accommodation would allow the individual to perform the essential functions of the position, 'the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.'").

An employer's showing that the requested accommodation would violate the rules of an existing seniority system is ordinarily enough to show that the accommodation is not "reasonable" and to entitle the employer to summary judgment. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 394,406 (2002). The employee may defeat summary judgment by presenting evidence of special circumstances that make an exception to a seniority rule "reasonable" in the particular case. *Id.* at 1519, 1525. Examples of special circumstances are the employer's fairly frequent

exercise of a right to change the seniority system unilaterally and a seniority system containing exceptions such that one further exception is unlikely to matter. *Id*. at 1525.

The ADA does not require the preferential treatment of individuals with disabilities in terms of job qualifications as a reasonable accommodation. *See Harris v. Polk County*, 103 F.3d 696, 697 (8th Cir. 1996) (employer lawfully denied job to disabled applicant on basis of criminal record which allegedly had resulted from prior psychological problems because "an employer may hold disabled employees to the same standard of law-abiding conduct as all other employees").

For more discussion of "reasonable accommodations" under the ADA, *see infra* Model Instruction 5.51C and Committee Comments.

The Interactive Process

Before an employer must make an accommodation for the physical or mental limitation of an employee, the employer must have knowledge that such a limitation exists. *Miller v. National Casualty Co.*, 61 F.3d 627, 629 (8th Cir. 1995); *accord Cannice v. Norwest Bank Iowa N.A.*, 189 F.3d 723, 726 (8th Cir. 1999). Thus, it is generally the responsibility of the plaintiff to request the provision of a reasonable accommodation. *Miller*, 61 F.3d at 630 (citing 29 C.F.R. § 1630 App., § 1630.9); *Cannice*, 189 F.3d at 727; *accord Buckles v. First Data Resources, Inc.*, 176 F.3d 1098, 1101 (8th Cir. 1999) (The burden remains with the plaintiff "to show that a reasonable accommodation, allowing him to perform the essential functions of his job, is possible."); *Mole v. Buckhorn Rubber Prods., Inc.*, 165 F. 3d 1212, 1218 (8th Cir. 1999) (affirming grant of summary judgment for the defendant where "only [the plaintiff] could accurately identify the need for accommodations specific to her job and workplace" and she failed to do so); *Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681, 689 (8th Cir. 1998) ("Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee . . . to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations." (citation omitted)).

Once the plaintiff has made such a request, the ADA and its implementing regulations require that the parties engage in an "interactive process" to determine what precise accommodations are necessary. *See* 29 C.F.R. § 1630.2(o)(3) & § 1630 App., § 1630.9; *accord Fjellestad*, 188 F.3d at 951. This means that the employer "should first analyze the relevant job and the specific limitations imposed by the disability and then, in consultation with the individual, identify potential effective accommodations." *See Cannice*, 189 F.3d at 727. In essence, the employer and the employee must work together in good faith to help each other determine what accommodation is necessary. *Id.*

Several courts, however, have held that an employer's failure to engage in an interactive process, standing alone, is insufficient to expose the employer to liability under the ADA. *See, e.g., Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 752 (9th Cir. 1998) (and cases cited therein); *accord Cravens*, 214 F.3d at 1021; *Fjellestad*, 188 F.3d at 952 ("We tend to agree with those courts that

hold that there is no per se liability under the ADA if an employer fails to engage in an interactive process."); *Cannice*, 189 F.3d at 727.

The Eighth Circuit has recognized that although an employer will not be held liable under the ADA for failing to engage in an interactive process if no reasonable accommodation was possible, the failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith. *See Fjellestad*, 188 F.3d at 952; *Cravens*, 214 F.3d at 1021 (To establish that an employer failed to participate in an interactive process, a disabled employee must show the employer knew about the disability; the employee requested accommodation or assistance; the employer did not make a good faith effort to assist the employee; and the employee could have been reasonably accommodated but for the employer's lack of good faith.). Accordingly, the Eighth Circuit has held that summary judgment is typically precluded when there is a genuine dispute as to whether the employer acted in good faith and engaged in the interactive process of seeking reasonable accommodations. *See Cravens*, 214 F.3d at 1022; *Fjellestad*, 188 F.3d at 953; *accord Deane v. Pocono Medical Center*, 142 F.3d 138 (3d Cir. 1998) (single telephone conversation between the plaintiff and employer "hardly satisfies our standard that the employer make reasonable efforts to assist the employee [and] to communicate with him in good faith").

On the other hand, summary judgment may be appropriate where the employee fails to engage in the interactive process. *See, e.g., Treanor*, 200 F.3d at 575 (the plaintiff failed to create a genuine question of fact in dispute on issue of interactive process where the plaintiff requested part-time work, the defendant indicated that no such position existed, the plaintiff failed to identify any particular "suitable" position and there was no evidence that the defendant acted in bad faith by failing to investigate further the existence of a reasonable accommodation); *Webster v. Methodist Occupational Health Centers, Inc.*, 141 F.3d 1236 (7th Cir. 1998) (no liability where employee failed to participate in the interactive process required under the ADA); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286 (11th Cir. 1997) (no liability where the plaintiff failed to engage in interactive process after employer offered accommodations in that she did not provide employer with any substantive reasons as to why all five of the proffered accommodations were unreasonable); *Gerdes v. Swift-Eckrich, Inc.*, 949 F. Supp. 1386 (N.D. Iowa 1996) (summary judgment for employer appropriate where responsibility for causing the breakdown of the interactive process rested plainly on the plaintiff), *aff'd*, 125 F.3d 634 (8th Cir. 1997).

Similarly, summary judgment may be appropriate in the absence of evidence that the employer failed to make a good faith effort to arrive at a reasonable accommodation for the plaintiff. *See, e.g., Mole*, 165 F.3d at 1218 (affirming grant of summary judgment for employer where "there is no evidence [the employer] failed to make a good faith reasonable effort to help [the plaintiff] determine if other accommodations might be needed."); *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130, 1137 (7th Cir. 1996) ("[W]here, as here, the employer does not obstruct the process, but instead makes reasonable efforts both to communicate with the employee and provide accommodation based on the information it possessed, ADA liability simply does not follow.").

Statutory Defenses

The ADA specifically provides for the following defenses: (1) undue hardship (42 U.S.C. § 12112(b)(5)(A)); (2) direct threat to the health or safety of others in the workplace (42 U.S.C. § 12113(b)); (3) employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)); (4) religious entity (42 U.S.C. § 12113(d)(1)); (5) infectious or communicable disease (42 U.S.C. § 12113(e)(2)); and (6) illegal use of drugs (42 U.S.C. § 12114(a)). The statutory defenses most likely to lead to instruction issues are undue hardship and direct threat. *See infra* Model Instructions 5.53A and 5.53B. The Committee assumes that the burden of proving and pleading these defenses is on the defendant.

Undue Hardship

As set forth above, the ADA provides that an employer need not provide a reasonable accommodation if it can prove that the accommodation would impose an undue hardship on the operation of its business. The term "undue hardship" is defined as "an action requiring significant difficulty or expense," which is to be considered in light of the following factors: (i) the nature and cost of the accommodation; (ii) the employer's financial resources at the facility in question; (iii) the employer's overall financial resources; and (iv) the fiscal relationship of the facility in question with the employer's overall business. 42 U.S.C. § 12111(10).

Direct Threat

The ADA specifically permits employers to reject applicants and terminate employees who pose a "direct threat" to the health or safety of others in the workplace if such direct threat cannot be eliminated by reasonable accommodation. 42 U.S.C. § 12113(b); *see Wood v. Omaha Sch. Dist.*, 25 F.3d 667 (8th Cir. 1994) (insulin-dependent individuals with poorly controlled diabetes were not qualified to serve as school bus drivers).

The courts also have used the "direct threat" doctrine to support the terminations of individuals who assault or threaten coworkers. For example, in *Williams v. Widnall*, 79 F.3d 1003 (10th Cir. 1996), the court upheld the termination of an alcoholic employee who threatened his supervisor. *See also Crawford v. Runyon*, 79 F.3d 743 (8th Cir. 1996) (upholding district court's finding of no pretext in termination of postal worker who threatened to kill his supervisor); *Fenton v. Pritchard Corp.*, 926 F. Supp. 1437 (D. Kan. 1996) (upholding termination of disgruntled employee who threatened to "go postal").

The Supreme Court, in *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 78 (2002), held that the statutory reference to threats to "other individuals in the workplace" did not preclude the EEOC from adopting a regulation that, in the Court's words, "carries the defense one step further," by allowing an employer to adopt a qualification standard requiring that an individual not pose a direct threat to the individual's own health or safety, as well as the health or safety of others. 29 C.F.R. § 1630.15(b)(2). *See also* 29 C.F.R. § 1630.2(r).

Employment Cases - Americans with Disabilities Act (ADA)

Procedures and Remedies

Pursuant to 42 U.S.C. § 12117, ADA cases generally adopt the procedures and remedy schemes from Title VII cases. *Doane v. City of Omaha*, 115 F.3d 624, 629 (8th Cir. 1997). Accordingly, an EEOC charge and right-to-sue notice typically will be necessary preconditions to an ADA claim. *See* 42 U.S.C. § 2000e-5. By virtue of the Civil Rights Act of 1991, damages under the ADA generally are the same as those available under Title VII. Thus, potential remedies in ADA cases include backpay, compensatory damages, punitive damages, and attorneys' fees. *See* 42 U.S.C. § 1981a.

In ADA cases, a plaintiff prevails on the issue of liability by showing that discrimination was a "motivating factor" in the adverse employment decision. *Pedigo v. P.A.M. Transport, Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995). *See also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 97-102 (2003) (holding that "motivating factor" is the standard for liability in a Title VII discrimination case). The employer may nevertheless avoid an award of damages or reinstatement by showing that it would have taken the same action in the absence of the impermissible motivating factor. *Pedigo*, 60 F.3d at 1301; *Doane*, 115 F.3d at 629. In such cases, "remedies available are limited to a declaratory judgment, an injunction that does not include an order for reinstatement or for back pay, and some attorney's fees and costs." *Doane*, 115 F.3d at 629 (quoting *Pedigo*, 60 F.3d at 1301) (citing 42 U.S.C. § 2000e-5(g)(2)(B)(i) & (ii)). *But see Pedigo v. P.A.M. Transport, Inc.*, 98 F.3d 396, 397-98 (8th Cir. 1996) (discussing prevailing party for purposes of awarding attorneys' fees).

In addition, the ADA provides a "good faith" defense if an employer "demonstrates good faith efforts" to find a reasonable accommodation with the plaintiff. *See* 42 U.S.C. § 1981a(a)(3) and Model Instruction 5.55, *infra*. If the jury finds that the employer has made such efforts, the plaintiff cannot recover compensatory or punitive damages. *See* 42 U.S.C. § 1981a(a)(3).

Employment Cases - Americans with Disabilities Act (ADA)

5.51A ADA - DISPARATE TREATMENT - ELEMENTS (Actual Disability)

Your verdict must be for the plaintiff and against the defendant if all of the following elements have been proved[1]:

First, the plaintiff had (specify alleged impairment(s));[2] and

Second, such (specify alleged impairment(s)) substantially limited the plaintiff's ability to (specify major life activity or activities affected); and[3]

Third, the defendant (specify action(s) taken with respect to the plaintiff)[4]; and

Fourth, the plaintiff could have performed the essential functions[5] of (specify job held or position sought)[6] at the time the defendant (specify action(s) taken with respect to the plaintiff) and

Fifth, the defendant knew[7] of the plaintiff's (specify alleged impairment(s)) and the plaintiff's (specify alleged impairment(s)) [was a motivating factor][8] [played a part][9] in the defendant's decision to (specify action(s) taken with respect to the plaintiff).

If any of the above elements has not been proved, [or if the defendant is entitled to a verdict under (describe instruction),][10] then your verdict must be for the defendant. [You may find that the plaintiff's (specify alleged impairment(s)) [was a motivating factor] [played a part] in the defendant's (decision)[11] if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.] [12]

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. In a typical case, the plaintiff will allege discrimination on the basis of an actual disability. *See* 42 U.S.C. § 12102(1)(A). In such cases, the name of the condition is not essential as long as the specified condition fits the definition of an impairment, as that term is used in the ADA. *See Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997) ("[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.") (quoting 29 C.F.R. § 1630 App., § 1630.2(j)). Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1222 (8th Cir. 1997) (cautioning district court to be mindful of placing "undue emphasis" on one party's evidence).

As discussed in the Committee Comments, however, if the plaintiff contends that he or she had a record of a disability, the language of the instruction will have to be modified. *See* 42 U.S.C. § 12102(1)(B). For cases in which the plaintiff alleges that he or she was regarded by the defendant as having a disability, *see infra* Model Instruction 5.51B. *See id.* § 12102(1)(C).

3. This element is designed to submit the issue of whether the plaintiff's alleged impairment constitutes a "disability" under the ADA. If necessary, the phrase "substantially limits" may be defined. *See infra* Model Instruction 5.52C.

4. Insert the appropriate language depending on the nature of the case (*e.g.*,"discharge," "failure to hire," "failure to promote," or "demotion" case). Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

5. This element is designed to submit the issue of whether the plaintiff is a "qualified individual" under the ADA. If necessary, the phrase "essential functions" may be defined. *See infra* Model Instruction 5.52B.

6. In a discharge or demotion case, specify the position held by the plaintiff. In a failure-to-hire or failure-to-promote case, specify the position for which the plaintiff applied. *See Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 575-76 (8th Cir. 2000) (agreeing with district court's assessment that it could not evaluate whether the plaintiff was a qualified individual within the meaning of the ADA because the plaintiff failed to identify any particular job for which she was qualified).

7. This language may need to be modified if there is a dispute whether the defendant had adequate knowledge of the plaintiff's impairment. *See Webb v. Mercy Hosp.*, 102 F.3d 958, 960 (8th Cir. 1996) (holding that an employer did not violate the ADA when it discharged a nurse who had a history of hospitalization for depression because there was no evidence that the employer knew of her diagnosis); *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983, 990 (8th Cir. 1996) (upholding summary judgment for the employer where the plaintiff concealed the severity of her disabling condition even though the employer had some awareness of the plaintiff's health problems). *See also Miller v. National Casualty Co.*, 61 F.3d 627, 630 (8th Cir. 1995) (employee's complaints of stress insufficient to put employer on notice of any disability when it had not been informed about a diagnosis of manic depression; to extent symptoms were known, they were not "so obviously manifestations of an underlying disability that it would be reasonable to infer that [her] employer actually knew of the disability" (quoting *Hedberg v. Indiana Bell Tele. Co.*, 47 F.3d 928, 934 (7th Cir. 1995))). For more discussion on this issue, *see supra* section 5.50.

8. "Motivating factor" is the proper phrase to use in the instruction, *see Pedigo v. P.A.M. Transport Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995), and the Committee recommends that the definition set forth in Model Instruction 5.96, *infra*, be given.

9. *See infra* Model Instruction 5.96, which defines "motivating factor" in terms of whether the characteristic "played a part or a role" in the defendant's decision. The phrase "motivating factor" need not be defined if the definition itself is used in the element instruction.

10. This language should be used when the defendant is submitting an affirmative defense. The ADA specifically provides for the following affirmative defenses: direct threat (42 U.S.C. § 12113(b)); religious entity (42 U.S.C. § 12113(d)(1)); infectious or communicable disease (42 U.S.C. § 12113(e)(2)); illegal use of drugs (42 U.S.C. 12114(a)); undue hardship (42 U.S.C. § 12112(b)(5)(A)); and employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)).

11. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

12. This sentence may be added, if appropriate. *See infra* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

This instruction is designed to submit cases in which the primary issue is whether the plaintiff's disability was a motivating factor in the employment decision. The instruction may be modified if the plaintiff alleges that he or she has a record of a disability. *See* 42 U.S.C. § 12102(1)(B); 29 C.F.R. § 1630.2(g). If the plaintiff alleges that he or she did not have an actual disability, but that he or she was regarded by the defendant as having a disability, *see* 42 U.S.C. § 12102(1)(C), the appropriate instruction for use is Model Instruction 5.51B, *infra*.

The *McDonnell Douglas* burden-shifting scheme applies in analyzing claims of intentional discrimination under the ADA. *See, e.g., Christopher v. Adam's Mark Hotels*, 137 F.3d 1069, 1071 (8th Cir. 1998) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973)). It is unnecessary and inadvisable, however, to instruct the jury regarding the *McDonnell Douglas* analysis. *Lang v. Star Herald*, 107 F.3d 1308, 1312 (8th Cir. 1997) ("Reference to this complex analysis is not necessary . . . or even recommended."); *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 731 (8th Cir. 1992) ("[T]he *McDonnell Douglas* 'ritual is not well suited as a detailed instruction to the jury' and adds little understanding to deciding the ultimate question of discrimination.") (quoting *Grebin v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 779 F.2d 18, 20 (8th Cir. 1985)). Instead, the submission to the jury should focus on the ultimate issues of whether intentional discrimination was a motivating factor in the defendant's employment decision. *See Lang*, 107 F.3d at 1312.

5.51B ADA - DISPARATE TREATMENT - ELEMENTS (Perceived Disability)

Your verdict must be for the plaintiff and against the defendant if all of the following elements have been proved[1]:

First, [the plaintiff had or] [the defendant knew or believed plaintiff had] (specify alleged impairment(s))[2] ; and

Second, the defendant (specify action(s) taken with respect to the plaintiff)[3]; and

Third, the plaintiff could have performed the essential functions[4] of (specify job held or position sought)[5] at the time the defendant (specify action(s) taken with respect to the plaintiff); and

Fourth, the defendant's belief regarding plaintiff's (specify alleged impairment(s)) [was a motivating factor][6] [played a part][7] in the defendant's decision to (specify action(s) taken with respect to the plaintiff).

If any of the above elements has not been proved, [or if the defendant is entitled to a verdict under (describe instruction),][8] then your verdict must be for the defendant. [You may find that the plaintiff's (specify alleged impairment(s)) [was a motivating factor] [played a part] in the defendant's (decision)[9] if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.] [10]

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. It may be that in the majority of "perceived disability" cases, the plaintiff has an actual impairment, although the impairment does not substantially limit any of the plaintiff's major life activities. *See* 42 U.S.C. § 12102(3)(A) (explaining that an individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under the ADA because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity). An impairment that is transitory (having an actual or expected duration of six months or less) and minor does not qualify as a perceived disability. 42 U.S.C. § 12102(3)(B).

The name of the condition is not essential as long as the specified condition fits the definition of an impairment as used in the ADA. *See Doane v. City of Omaha*, 115 F.3d 624,

627 (8th Cir. 1997) ("[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.") (quoting 29 C.F.R. § 1630 App., § 1630.2(j)). Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1222 (8th Cir. 1997) (cautioning district court to be mindful of placing "undue emphasis" on one party's evidence).

3. Insert the appropriate language depending on the nature of the case (*e.g.*,"discharge," "failure to hire," "failure to promote," or "demotion" case). Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.57.

4. This element is designed to submit the issue of whether the plaintiff is a "qualified individual" under the ADA. If necessary, the phrase "essential functions" may be defined. *See infra* Model Instruction 5.52B.

5. In a discharge or demotion case, specify the position held by the plaintiff. In a failure-to-hire or failure-to-promote case, specify the position for which the plaintiff applied. *See Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 575-76 (8th Cir. 2000) (agreeing with district court's assessment that it could not evaluate whether the plaintiff was a qualified individual within the meaning of the ADA because the plaintiff failed to identify any particular job for which she was qualified).

6. "Motivating factor" is the proper phrase to use in the instruction, *see Pedigo v. P.A.M. Transport Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995), and the Committee recommends that the definition set forth in Model Instruction 5.96, *infra*, be given.

7. *See infra* Model Instruction 5.96, which defines "motivating factor" in terms of whether the characteristic "played a part or a role" in the defendant's decision. The phrase "motivating factor" need not be defined if the definition itself is used in the element instruction.

8. This language should be used when the defendant is submitting an affirmative defense. The ADA specifically provides for the following affirmative defenses: direct threat (42 U.S.C. § 12113(b)); religious entity (42 U.S.C. § 12113(d)(1)); infectious or communicable disease (42 U.S.C. § 12113(e)(2)); illegal use of drugs (42 U.S.C. 12114(a)); undue hardship (42 U.S.C. § 12112(b)(5)(A)); and employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)).

9. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

10. This sentence may be added, if appropriate. *See infra* Model Instruction 5.95 and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Employment Cases - Americans with Disabilities Act (ADA)

Committee Comments

This instruction is designed to submit cases in which the primary issue is whether the plaintiff's perceived disability was a motivating factor in the employment decision. *See* 42 U.S.C. § 12102(1)(C).

The *McDonnell Douglas* burden-shifting scheme applies in analyzing claims of intentional discrimination under the ADA. *See, e.g., Christopher v. Adam's Mark Hotels*, 137 F.3d 1069, 1071 (8th Cir. 1998) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973)). It is unnecessary and inadvisable, however, to instruct the jury regarding the *McDonnell Douglas* analysis. *Lang v. Star Herald*, 107 F.3d 1308, 1312 (8th Cir. 1997) ("Reference to this complex analysis is not necessary . . . or even recommended.").

Employment Cases - Americans with Disabilities Act (ADA)

5.51A/B(1) ADA - DISPARATE TREATMENT "SAME DECISION"

If you find in favor of the plaintiff under Instruction ___,[1] then you must answer the following question in the verdict form[s]: Has it been proved[2] that the defendant would have (specify action taken with respect to the plaintiff) even if the defendant had not considered the plaintiff's (specify alleged impairment)?

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

Committee Comments

If a plaintiff prevails on the issue of liability by showing that discrimination was a "motivating factor," the defendant nevertheless may avoid an award of damages or reinstatement by showing that it would have taken the same action "in the absence of the impermissible motivating factor." *See* 42 U.S.C. § 2000e-5(g)(2)(B). This instruction is designed to submit this "same decision" issue to the jury. *See Doane v. City of Omaha*, 115 F.3d 624, 629 (8th Cir. 1997) (discussing remedies available in "mixed motive" case under ADA); *Pedigo v. P.A.M. Transport, Inc.*, 60 F.3d 1300, 1301 (8th Cir. 1995) (same). *See also Pedigo v. P.A.M. Transport, Inc.*, 98 F.3d 396, 396-97 (8th Cir. 1996) (discussing "prevailing party" for purposes of awarding attorneys' fees).

5.51C ADA - REASONABLE ACCOMMODATION CASES (Specific Accommodation Identified)

Your verdict must be for the plaintiff and against the defendant if all of the following elements have been proved[1]:

First, the plaintiff had (specify alleged impairment(s));[2] and

Second, such (specify alleged impairment(s)) substantially limited the plaintiff's ability to (specify major life activity or activities affected); and[3]

Third, the defendant knew[4] of the plaintiff's (specify alleged impairment(s)); and

Fourth, the plaintiff could have performed the essential functions[5] of the (specify job held or position sought) at the time the defendant (specify action(s) taken with respect to the plaintiff) if the plaintiff had been provided with (specify accommodation(s) identified by the plaintiff)[6]; and

Fifth, providing (specify accommodation(s) identified by the plaintiff) would have been reasonable; and

Sixth, the defendant failed to provide (specify accommodation(s) identified by the plaintiff) and failed to provide any other reasonable accommodation.[7]

If any of the above elements has not been proved, [or if the defendant is entitled to a verdict under (describe instruction),][8] then your verdict must be for the defendant.

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. The name of the condition is not essential as long as the specified condition fits the definition of an impairment as used in the ADA. *See Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997) ("[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.") (quoting 29 C.F.R. § 1630 App., § 1630.2(j)). Excessive detail is neither necessary nor desirable and may be interpreted by the appellate court as a comment on the evidence. *See Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1222 (8th Cir. 1997) (cautioning district court to be mindful of placing "undue emphasis" on one party's evidence).

3. This element is designed to submit the issue of whether the plaintiff's alleged impairment constitutes a "disability" under the ADA. If necessary, the phrase "substantially limits" may be defined. *See infra* Model Instruction 5.52C.

4. This language may need to be modified if there is a dispute whether the defendant had adequate knowledge of the plaintiff's impairment. *See Webb v. Mercy Hosp.*, 102 F.3d 958, 960 (8th Cir. 1996) (holding that an employer did not violate the ADA when it discharged a nurse who had a history of hospitalization for depression because there was no evidence that the employer knew of her diagnosis); *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983, 990 (8th Cir. 1996) (upholding summary judgment for the employer where the plaintiff concealed the severity of her disabling condition even though the employer had some awareness of the plaintiff's health problems). *See also Miller v. National Casualty Co.*, 61 F.3d 627, 630 (8th Cir. 1995) (employee's complaints of stress insufficient to put employer on notice of any disability when it had not been informed about a diagnosis of manic depression; to extent symptoms were known, they were not "so obviously manifestations of an underlying disability that it would be reasonable to infer that [her] employer actually knew of the disability" (quoting *Hedberg v. Indiana Bell Tele. Co.*, 47 F.3d 928, 934 (7th Cir. 1995))). For more discussion on this issue, *see supra* section 5.50.

5. This element is designed to submit the issue of whether the plaintiff is a "qualified individual" under the ADA. If necessary, the phrase "essential functions" may be defined. *See infra* Model Instruction 5.52B.

6. It may be that in the majority of cases, the plaintiff requests the provision of a specific accommodation (*e.g.*, a modified work schedule). In some cases, however, the plaintiff may simply notify the employer of his or her need for an accommodation in general. In such cases, the language of the instruction should be modified.

7. An employer is not obligated to provide an employee the accommodation he or she requests or prefers. *See, e.g., Cravens*, 214 F.3d at 1019. The employer need only provide some reasonable accommodation. *Hennenfent v. Mid Dakota Clinic, P.C.*, 164 F.3d 419, 422 n.2 (8th Cir. 1998); *accord Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1137 (8th Cir. 1999) ("If more than one accommodation would allow the individual to perform the essential functions of the position, 'the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.'").

8. This language should be used when the defendant is submitting an affirmative defense. The ADA specifically provides for the following affirmative defenses: direct threat (42 U.S.C. § 12113(b)); religious entity (42 U.S.C. § 12113(d)(1)); infectious or communicable disease (42 U.S.C. § 12113(e)(2)); illegal use of drugs (42 U.S.C. § 12114(a)); undue hardship (42 U.S.C. § 12112(b)(5)(A)); and employment qualification standard, test or selection criterion that is job-related and consistent with business necessity (42 U.S.C. § 12113(a)).

Employment Cases - Americans with Disabilities Act (ADA)

Committee Comments

The ADA requires employers to make reasonable accommodations to allow disabled individuals to perform the essential functions of their positions. *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999). Although many individuals with disabilities are qualified to perform the essential functions of jobs without need of any accommodation, this instruction is designed for use in cases in which the nature or extent of accommodations provided to an otherwise qualified individual is in dispute. For a discussion of the "interactive process" in which employers and employees may be required to engage to determine the nature and extent of accommodations needed, *see supra* section 5.50.

The term "accommodation" means making modifications to the work place which allows a person with a disability to perform the essential functions of the job or allows a person with a disability to enjoy the same benefits and privileges as an employee without a disability. *See Kiel*, 169 F.3d at 1136 ("A reasonable accommodation should provide the disabled individual an equal employment opportunity, including an opportunity to attain the same level of performance, benefits, and privileges that is available to similarly situated employees who are not disabled.").

A "reasonable" accommodation is one that could reasonably be made under the circumstances and may include but is not limited to: making existing facilities used by employees readily accessible to and usable by individuals with disabilities; job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. 29 C.F.R. § 1630.2(o); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112-13 (8th Cir. 1995).

Although part-time work and job restructuring may be considered reasonable accommodations, "[t]his does not mean an employer is required to offer those accommodations in every case." *Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 575 (8th Cir. 2000). Moreover, although job restructuring is a possible accommodation under the ADA, an employer need not reallocate the essential functions of a job. *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 950 (8th Cir. 1999); *Lloyd v. Hardin County, Iowa*, 207 F.3d 1080, 1084 (8th Cir. 2000); *Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570, 575 (8th Cir. 2000); *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 788 (8th Cir. 1998); *Benson*, 62 F.3d at 1112-13 (citing 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii)). In addition, an employer is not obligated to hire additional employees or reassign existing workers to assist an employee. *Fjellestad*, 188 F.3d at 950 (citing *Moritz*, 124 F.3d at 788). The ADA does not require an accommodation "that would cause other employees to work harder, longer, or be deprived of opportunities." *Rehrs v. The Iams Co.*, 486 F.3d 353, 357 (8th Cir. 2007).

Reassignment to a vacant position is another possible accommodation under the ADA. *Benson*, 62 F.3d at 1114 (citing 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii)); *see also Fjellestad*, 188 F.3d at 950-51 (the plaintiff created genuine issue of material fact as to whether employer could have reassigned her to a specific, vacant position). In fact, the Eighth Circuit

has recognized that, in certain circumstances, reassignment to a vacant position may be "necessary" as a reasonable accommodation. *See Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1018 (8th Cir. 2000). The scope of the reassignment duty is limited, however. *Id.* at 1019. For example, reassignment is an accommodation of "last resort"; that is, the "very prospect of reassignment does not even arise unless accommodation within the individual's current position would pose an undue hardship." *Id.* Moreover, the ADA does not require an employer to create a new position as an accommodation. *Id.*; *see also Treanor*, 200 F.3d at 575 ("[T]he ADA does not require an employer to create a new part-time position where none previously existed."); *Fjellestad*, 188 F.3d at 950 (employer not required to create new position or to create permanent position out of a temporary one). An employer who has an established policy of filling vacant positions with the most qualified applicant is not required to assign the vacant position to a disabled employee who, although qualified, is not the most qualified applicant. *Huber v. Wal-Mart Stores*, 486 F.3d 480, 483-84 (8th Cir. 2007). In addition, an employer is not required to "bump" another employee in order to reassign a disabled employee to that position. *Cravens*, 214 F.3d at 1019. Promotion is not required. *Id.* Finally, the employee must be "otherwise qualified" for the reassignment position. *Id.*

An employer is not obligated to provide an employee the accommodation he or she requests or prefers. *See, e.g., Cravens*, 214 F.3d at 1019. The employer need only provide some reasonable accommodation. *Hennenfent v. Mid Dakota Clinic, P.C.*, 164 F.3d 419, 422 n.2 (8th Cir. 1998); *accord Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1137 (8th Cir. 1999) ("If more than one accommodation would allow the individual to perform the essential functions of the position, 'the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.'").

An employer's showing that the requested accommodation would violate the rules of an existing seniority system (*e.g.*, an employee's request to remain at a lighter duty position in the mailroom, in disregard of more senior employees' rights to "bid in" to that position) is ordinarily enough to show that the accommodation is not "reasonable" and to entitle the employer to summary judgment. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 394, 403-04, 122 S. Ct. 1516, 1519, 1524 (2002). The employee may defeat summary judgment and create a jury question by presenting evidence of special circumstances that make an exception to a seniority rule "reasonable" in the particular case. *Id.* at 1519, 1525. Examples of special circumstances are the employer's fairly frequent exercise of a right to change the seniority system unilaterally and a seniority system containing exceptions such that one further exception is unlikely to matter. *Id*. at 1525.

The ADA does not require the preferential treatment of individuals with disabilities in terms of job qualifications as a reasonable accommodation. *See Harris v. Polk County*, 103 F.3d 696, 697 (8th Cir. 1996) (employer lawfully denied job to disabled applicant on basis of criminal record which allegedly had resulted from prior psychological problems because "an employer may hold disabled employees to the same standard of law-abiding conduct as all other employees").

Employment Cases - Americans with Disabilities Act (ADA)

In some cases, the timing of the plaintiff's alleged disability is critical. If necessary, the language may be modified to incorporate the relevant time frame of the plaintiff's alleged disability.

Employment Cases - Americans with Disabilities Act (ADA)

5.52A ADA - DEFINITION: DISABILITY

[No definition recommended.]

Committee Comments

As drafted, the Model Instructions do not use the term "disability" and, thus, do not require the jury to determine whether a plaintiff has a "disability." Rather, the instructions require the jury to find the facts which support the underlying elements of a disability under the Act.

5.52B ADA - DEFINITION: ESSENTIAL FUNCTIONS

In determining whether a job function is essential, you should consider the following factors: [(1) The employer's judgment as to which functions of the job are essential; (2) written job descriptions; (3) the amount of time spent on the job performing the function in question; (4) consequences of not requiring the person to perform the function; (5) the terms of a collective bargaining agreement; (6) the work experience of persons who have held the job; (7) the current work experience of persons in similar jobs; (8) whether the reason the position exists is to perform the function; (9) whether there are a limited number of employees available among whom the performance of the function can be distributed; (10) whether the function is highly specialized and the individual in the position was hired for [(his) (her)] expertise or ability to perform the function; and (11) (list any other relevant factors supported by the evidence)].[1]

No one factor is necessarily controlling. You should consider all of the evidence in deciding whether a job function is essential.

The term "essential functions" means the fundamental job duties of the employment position the plaintiff holds or for which the plaintiff has applied. The term "essential functions" does not include the marginal functions of the position.

Notes on Use

1. This instruction should be modified, as appropriate, to include only those factors supported by the evidence.

Committee Comments

The ADA protects only those individuals who, with or without reasonable accommodation, can perform the essential functions of the employment position that the plaintiff holds or desires. *See* 42 U.S.C. § 12111(8); *Lloyd v. Hardin County, Iowa*, 207 F.3d 1080, 1084 (8th Cir. 2000); *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 786-87 (8th Cir. 1998); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112-13 (8th Cir. 1995). Thus, this instruction is designed for use in connection with the essential elements instruction in cases where the issue of whether a particular job requirement or task is an "essential function" of the job is in dispute. The instruction, although not technically a definition, should be used to instruct the jury in determining whether a given job duty is essential.

The instruction is based on 29 C.F.R. § 1630.2(n) and the Eighth Circuit's opinions in *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445-46 (8th Cir. 1998) (“An employer's

identification of a position's 'essential functions' is given some deference under the ADA."); *Moritz*, 147 F.3d at 787; and *Benson*, 62 F.3d at 1113.

5.52C ADA - DEFINITION: SUBSTANTIALLY LIMITS

In determining whether the plaintiff's impairment substantially limits the plaintiff's ability to (specify major life activity affected), you should compare the plaintiff's ability to (specify major life activity affected) with that of the average person. In doing so, you should also consider: (1) the nature and severity of the impairment; (2) how long the impairment will last or is expected to last; and (3) the permanent or long-term impact, or expected impact, of the impairment. [Temporary impairments with little or no long-term impact are not sufficient.][1]

It is not the name of an impairment or a condition that matters, but rather the effect of an impairment or condition on the life of a particular person.

Notes on Use

1. Use the bracketed language only if it is supported by the evidence.

Committee Comments

This instruction is designed for use in connection with the essential elements instruction in cases in which the issue of whether the plaintiff has a disability under the ADA is in dispute. The language of the instruction is based on 29 C.F.R. § 1630.2(j). The term "substantially limits" may be of such common usage that a definition is not required. If the Court desires to define the term, however, the Committee recommends this definition. This instruction should not be given in cases where the plaintiff claims that the defendant "regarded" the plaintiff as having an impairment.

An impairment is only a disability under the ADA if it substantially limits one or more major life activities. *See* 42 U.S.C. § 12102(1).

Employment Cases - Americans with Disabilities Act (ADA)

5.53A "UNDUE HARDSHIP" - STATUTORY DEFENSE

Your verdict must be in favor of the defendant if it has been proved[1] that providing (specify accommodation) would cause an undue hardship on the operation of the defendant's business.

The term "undue hardship," as used in these instructions, means an action requiring the defendant to incur significant difficulty or expense when considered in light of the following:

[(1) the nature and cost of (specify accommodation);

(2) the overall financial resources of the facility involved in the provision of (specify accommodation), the number of persons employed at such facility and the effect on expenses and resources;

(3) the overall financial resources of the defendant;

(4) the overall size of the business of the defendant with respect to the number of its employees and the number, type and location of its facilities;

(5) the type of operation of the defendant, including the composition, structure, and functions of the workforce;

(6) the impact of (specify accommodation) on the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business;

and (list any other relevant factors supported by the evidence)].[2]

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. This instruction should be modified, as appropriate, to include only those factors supported by the evidence.

Committee Comments

Under the ADA, an employer must provide a reasonable accommodation to the known physical limitations of a qualified applicant or employee with a disability unless it can show that the accommodation would impose an undue hardship on the business. *See* 42 U.S.C. § 12111(9), 42 U.S.C. § 12112(b)(5) and Model Instruction 5.51B, *supra*, Committee Comments. Thus, this instruction should be used to submit the defense of undue hardship. *See* 42 U.S.C. § 12111(10).

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Eighth Circuit case law holds that the defendant in any civil case is entitled to a specific instruction on its theory of the case, if the instruction is "legally correct, supported by the evidence and brought to the court's attention in a timely request." *Des Moines Bd. of Water Works v. Alvord, Burdick & Howson*, 706 F.2d 820, 823 (8th Cir. 1983).

Employment Cases - Americans with Disabilities Act (ADA)

5.53B "DIRECT THREAT" - STATUTORY DEFENSE

Your verdict must be in favor of the defendant if it has been proved[1] that:

First, the defendant (specify action(s) taken with respect to the plaintiff) because the plaintiff posed a direct threat to the health or safety of [(the plaintiff) (others) (the plaintiff or others)[2]] in the workplace; and

Second, such direct threat could not be eliminated [3] by reasonable accommodation.

A direct threat means a significant risk of substantial harm to the health or safety of the person or other persons that cannot be eliminated by reasonable accommodation. The determination that a direct threat exists must be based on an individualized assessment of the plaintiff's present ability to safely perform the essential functions of the job.

In determining whether a person poses a direct threat, you must consider: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the likely time before the potential harm occurs.

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Select the word or phrase that best describes the defendant's theory.

3. The term "direct threat" is defined by the ADA as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *See* 42 U.S.C. § 12111 (3). The applicable regulations define "direct threat" as a "significant risk of substantial harm to the health or safety *of the individual* or others that cannot be eliminated *or reduced* by reasonable accommodation." *See* 29 C.F.R. § 1630.2(r) (emphasis added).

Committee Comments

This instruction should be used in submitting the defense of direct threat. *See* 42 U.S.C. § 12111(3); 29 C.F.R. 1630.2(r). Eighth Circuit case law holds that the defendant in any civil case is entitled to a specific instruction on its theory of the case, if the instruction is "legally correct, supported by the evidence and brought to the court's attention in a timely request." *Des Moines Bd. of Water Works v. Alvord, Burdick & Howson*, 706 F.2d 820, 823 (8th Cir. 1983).

Under the ADA, an employer may apply its qualification standards, tests, or selection criteria to screen out, deny a job to, or deny a benefit of employment to a disabled person, if such criteria are job-related and consistent with business necessity and if the person cannot perform

the essential function of the position with reasonable accommodation. 42 U.S.C. § 12113(a); *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1283-84 (7th Cir. 1995).

The ADA includes within the term "qualification standards" the requirement that the employee not pose a direct threat to the health or safety of other individuals in the workplace. *See* 42 U.S.C. § 12133(b). The Supreme Court has upheld 29 C.F.R. §§ 1630.2(r) and 1630.15(b)(2), which also allow an employer to adopt a qualification standard requiring that the individual not pose a direct threat to his or her own safety. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 78 (2002).

For a discussion of the "direct threat" defense in the health care context, *see Bragdon v. Abbott*, 524 U.S. 624, 649-50 (1998) (health care professional has duty to assess risk based on objective, scientific information available to him or her and others in profession).

Employment Cases - Americans with Disabilities Act (ADA)

5.54A ACTUAL DAMAGES - ADA

If you find in favor of the plaintiff under Instruction ___[1] [and if you answer "no" in response to Instruction ___,][2] then you must award the plaintiff such sum as you find will fairly and justly compensate the plaintiff for any damages you find the plaintiff sustained as a direct result of [describe the defendant's decision--e.g., "the defendant's failure to hire the plaintiff"]. The plaintiff's claim for damages includes three distinct types of damages and you must consider them separately.

First, you must determine the amount of any wages and fringe benefits[3] the plaintiff would have earned in [(his) (her)] employment with the defendant if [(he) (she)] had not been discharged on [fill in date of discharge] through the date of your verdict,[4] *minus* the amount of earnings and benefits that the plaintiff received from other employment during that time.

Second, you must determine the amount of any other damages sustained by the plaintiff, such as [list damages supported by the evidence].[5] You must enter separate amounts for each type of damages in the verdict form and must not include the same items in more than one category.[6]

[You are also instructed that the plaintiff has a duty under the law to "mitigate" [(his) (her)] damages--that is, to exercise reasonable diligence under the circumstances to minimize [(his) (her)] damages. Therefore, if it has been proved[7] that the plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [(him) (her)], you must reduce [(his) (her)] damages by the amount [(he) (she)] reasonably could have avoided if [(he) (she)] had sought out or taken advantage of such an opportunity.][8]

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.][9]

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Fill in the number or title of the "same decision" instruction here. Even if the jury finds that the defendant would have made the same decision regardless of the plaintiff's disability, the Court may direct the jury to determine the amount of damages, if any, sustained by

the plaintiff. This approach will protect against the necessity of a retrial of the case in the event the underlying liability determination is reversed on appeal.

3. When certain benefits, such as employer-subsidized health insurance, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. *See Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1062 (8th Cir. 2002) (discussing lost benefits in ADEA case); *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104, 1111 (8th Cir. 1994) (allowing insurance replacement costs, lost 401(k) contributions in ADEA case).

4. Front pay is an equitable issue for the judge to decide. *Salitros v. Chrysler Corp.*, 306 F.3d 562, 571 (8th Cir. 2002). In some cases, the defendant will assert some independent post-discharge reason--such as a plant closing or sweeping reduction in force--as to why the plaintiff would have been terminated in any event before trial. *See, e.g., Cleverly v. Western Elec. Co.*, 450 F. Supp. 507 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979). In those cases, this instruction must be modified to submit this issue for the jury's determination.

5. Under the Civil Rights Act of 1991, a prevailing ADA plaintiff may recover damages for mental anguish and other personal injuries. The types of damages mentioned in § 1981a(b)(3) include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." For cases involving the provision of a reasonable accommodation (Model Instruction 5.51C, *supra*), the plaintiff may not recover such damages if the defendant demonstrated "good faith efforts" to arrive at a reasonable accommodation with the plaintiff. *See infra* Model Instruction 5.55.

6. If the issue of "front pay" is submitted to the jury, it should be distinguished from an award of compensatory damages, which is subject to the statutory cap. *See infra* Committee Comments. Accordingly, separate categories of damages must be identified.

7. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

8. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983); *Fieldler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808-09 (8th Cir. 1982).

9. This paragraph may be given at the trial court's discretion.

Committee Comments

The Civil Rights Act of 1991 makes three significant changes in the law regarding the recovery of damages in Title VII cases. First, the plaintiff prevails on the issue of liability by showing that unlawful discrimination was a "motivating factor" in the relevant employment decision; however, the plaintiff cannot recover any actual damages if the employer shows that it would have made the same employment decision even in the absence of any discriminatory intent. 42 U.S.C. § 2000e-2(g)(2)(B). Second, the Civil Rights Act permits the plaintiff to

recover general compensatory damages in addition to the traditional employment discrimination remedy of back pay and lost benefits. *Id.* § 1981a(a). Third, the Act expressly limits the recovery of general compensatory damages to certain dollar amounts, ranging from $50,000 to $300,000 depending upon the size of the employer. *Id.* § 1981a(b).

This instruction is designed to submit the standard back pay formula of lost wages and benefits reduced by interim earnings and benefits. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808-09 (8th Cir. 1982). This instruction may be modified to articulate the types of interim earnings which should be offset against the plaintiff's back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See Krause v. Dresser Industries*, 910 F.2d 674, 680 (10th Cir. 1990); *Cornetta v. United States*, 851 F.2d 1372, 1381 (Fed. Cir. 1988); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). Unemployment compensation, Social Security benefits or pension benefits ordinarily are not offset against a back pay award. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (holding that pension benefits are a "collateral source benefit"); *Dreyer v. Arco Chemical Co.*, 801 F.2d 651, 653 n.1 (3d Cir. 1986) (Social Security and pension benefits not deductible); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 138-39 (3d Cir. 1986) (unemployment benefits not deductible); *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (same). *But see Blum v. Witco Chemical Corp.*, 829 F.2d 367, 374 (3d Cir. 1987) (pension benefits received as a result of subsequent employment considered in offsetting damages award); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of unemployment compensation is within trial court's discretion); *Horn v. Duke Homes*, 755 F.2d 599, 607 n.12 (7th Cir. 1985) (same); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976) (same). However, because Title VII, as amended by the Civil Rights Act of 1991, no longer limits recovery of damages, the instruction permits the recovery of general damages for pain, suffering, humiliation, and the like.

Because the law imposes a limit on general compensatory damages but does not limit the recovery of back pay and lost benefits, the Committee believes that these types of damages must be considered and assessed separately by the jury. Otherwise, if the jury awarded a single dollar amount, it would be impossible to identify the portion of the award that was attributable to back pay and the portion that was attributable to "general damages." As a result, the trial court would not be able to determine whether the jury's award exceeded the statutory limit.

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy "in lieu of" reinstatement, front pay is an issue for the court, not the jury. *Salitros v. Chrysler Corp.*, 306 F.3d 562, 571 (8th Cir. 2002). If the trial court submits the issue of front pay to the jury, the jury's determination may be binding. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (ADEA case).

In *Kramer v. Logan County School Dist. No. R-1*, 157 F.3d 620, 625-26 (8th Cir. 1998), the court ruled that "front pay is an equitable remedy excluded from the statutory limit on compensatory damages provided for in [42 U.S.C.] § 1981a(b)(3)."

Employment Cases - Americans with Disabilities Act (ADA)

Although the Civil Rights Act of 1991 expressly limits the amount of compensatory and punitive damages depending upon the size of the employer, the jury shall not be advised on any such limitation. 42 U.S.C. § 1981a(c)(2). Instead, the trial court will simply reduce the verdict by the amount of any excess.

Employment Cases - Americans with Disabilities Act (ADA)

5.54B NOMINAL DAMAGES - ADA

If you find in favor of the plaintiff under Instruction ___[1] [and if you answer "no" in response to Instruction ___,][2] but you do not find that the plaintiff's damages have monetary value, then you must return a verdict for the plaintiff in the nominal amount of One Dollar ($1.00).[3]

Notes on Use

1. Fill in the number or title of the essential elements instruction here.

2. Fill in the number or title of the "same decision" instruction here. Even if the jury finds that the defendant would have made the same decision regardless of the plaintiff's disability, the Court may direct the jury to determine the amount of damages, if any, awarded to the plaintiff. This approach will protect against the necessity of a retrial of the case in the event the underlying liability determination is reversed on appeal.

3. One dollar ($1.00) arguably is the required amount in cases in which nominal damages are appropriate. Nominal damages are appropriate when the jury is unable to place a monetary value of the harm that the plaintiff suffered from the violation of his rights. *Dean v. Civiletti*, 670 F.2d 99, 101 (8th Cir. 1982) (Title VII); *cf. Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) (in prisoner civil rights action, nominal damages are appropriate where the jury cannot place a monetary value of the harm suffered by the plaintiff); *Haley v. Wyrick*, 740 F.2d 12 (8th Cir. 1984).

Committee Comments

Most employment discrimination cases involve lost wages and benefits. In some case, however, the jury may be permitted to return a verdict for only nominal damages. For example, if the plaintiff was given severance pay and was able to secure a better paying job, the evidence may not support an award of back pay, but may support an award of compensatory damages. This instruction is designed to submit the issue of nominal damages in appropriate cases.

Employment Cases - Americans with Disabilities Act (ADA)

5.54C PUNITIVE DAMAGES - ADA

In addition to the damages mentioned in the other instructions, the law permits the jury under certain circumstances to award punitive damages.

If you find in favor of the plaintiff under Instruction(s) _____,[1] and if you answer "no" in response to Instruction _____,[2] then you must decide whether the defendant acted with malice or reckless indifference to the plaintiff's right not to be discriminated against[3] on the basis of a disability. The defendant acted with malice or reckless indifference if:

> it has been proved[4] that (insert the name(s) of the defendant or manager[5] who terminated[5] the plaintiff's employment) knew that the [termination][6] was in violation of the law prohibiting disability discrimination, or acted with reckless disregard of that law.[7]

[However, you may not award punitive damages if it has been proved [that the defendant made a good-faith effort to comply with the law prohibiting disability discrimination][8].

If it has been proved that the defendant acted with malice or reckless indifference to the plaintiff's rights [and did not make a good faith effort to comply with the law,] then, in addition to any other damages to which you find the plaintiff entitled, you may, but are not required to, award the plaintiff an additional amount as punitive damages for the purposes of punishing the defendant for engaging in such misconduct and deterring the defendant and others from engaging in such misconduct in the future. You should presume that the plaintiff has been made whole for [(his) (her) (its)] injuries by the damages awarded under Instruction _____.[9]

In determining whether to award punitive damages, you should consider whether the defendant's conduct was reprehensible.[10] In this regard, you may consider whether the harm suffered by the plaintiff was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether the defendant's conduct that harmed the plaintiff also caused harm or posed a risk of harm to others; and whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed the plaintiff.[11]

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. how much harm the defendant's wrongful conduct caused the plaintiff [and could cause the plaintiff in the future].[12] [You may not consider harm to others in deciding the amount of punitive damages to award.][13]

2. what amount of punitive damages, in addition to the other damages already awarded, is needed, considering the defendant's financial condition, to punish the defendant for [(his) (her) (its)] wrongful conduct toward the plaintiff and to deter the defendant and others from similar wrongful conduct in the future;

3. [the amount of fines and civil penalties applicable to similar conduct].[14]

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to the plaintiff.[15]

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.][16]

[You may not award punitive damages against the defendant[s] for conduct in other states.][17]

Notes on Use

1. Fill in the number or title of the essential elements instruction here. *See supra* Model Instructions 5.51A, 5.51B and 5.51C.

2. Fill in the number or title of the "same decision" instruction if applicable. *See supra* Model Instruction 5.51A/B(1).

3. Although a finding of discrimination ordinarily subsumes a finding of intentional misconduct, this language is included to emphasize the threshold for recovery of punitive damages. Under the Civil Rights Act of 1991, the standard for punitive damages is whether the defendant acted "with malice or with reckless indifference to the [plaintiff's] federally protected rights." Civil Rights Act of 1991, § 102 (codified at 42 U.S.C. § 1981a(b)(1)).

4. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

5. Use the name of the defendant, the manager who took the action, or other descriptive phrase such as "the manager who fired the plaintiff."

6. This language is designed for use in a discharge case. In a "failure to hire," "failure to promote," "demotion," or "constructive discharge" case, the language must be modified.

7. *See Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535, 536 (1999) (holding that "'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination" and that "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages"); *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 903 (8th Cir. 2006) (citing *Kolstad* and observing that an award of punitive damages may be inappropriate when the underlying theory of discrimination is novel or poorly recognized or "when the employer (1) is unaware federal law prohibits the relevant conduct, (2) believes the discriminatory conduct is lawful, or (3) reasonably believes there is a bona fide occupational qualification defense for the discriminatory conduct").

8. Use this phrase only if the good faith of the defendant is to be presented to the jury. This two-part test was articulated by the United States Supreme Court in *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999), a Title VII case. For a discussion of *Kolstad*, see the Committee Comments. It is not clear from the case who bears the risk of nonpersuasion on the good faith issue. The Committee predicts that case law will place the burden on the defendant to raise the issue and prove it.

9. Fill in the number or title of the actual damages or nominal damages instruction here.

10. The word "reprehensible" is used in the same sense as it is used in common parlance. The Supreme Court, in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003), stated: "It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." In *Philip Morris USA v. Williams*, 549 U.S. 346, 355, 127 S. Ct. 1057, 1064-65 (2007), the Supreme Court held that, while harm to persons other than the plaintiff may be considered in determining reprehensibility, a jury may not punish for the harm caused to persons other than the plaintiff. The Court stated that procedures were necessary to assure "that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* at 355.

11. Any item not supported by the evidence, of course, should be excluded.

12. This sentence may be used if there is evidence of future harm to the plaintiff.

13. A paragraph instructing the jury that any punitive damages award should not include an amount for harm suffered by persons who are not parties to the case may be necessary if evidence concerning harm suffered by nonparties has been introduced. *See Philip Morris USA v. Williams*, 549 U.S. at 355; *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 422-24 (2003); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004).

14. Insert this phrase only if evidence has been introduced, or the court has taken judicial notice, of fines and penalties for similar conduct. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996), noting "civil penalties authorized in comparable cases" as a guidepost to be considered. *See also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003).

15. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (stating that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" and observing that: "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 [citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996)] or, in this case, of 145 to 1.").

16. The bracketed language is available for use if punitive damages claims are submitted against more than one defendant.

17. If evidence has been introduced concerning conduct by the defendant that was legal in the state where it was committed, the jury must be told that they cannot award punitive damages against the defendant for such conduct. *See State Farm Mut. Auto. Inc. Co. v. Campbell*, 538 U.S. 408, 422 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572-73 (1996); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004). This issue normally will not come up in cases under federal law. In any case in which evidence is admitted for some purposes but may not be considered by the jury in awarding punitive damages, the court should give an appropriate limiting instruction.

Committee Comments

Under the Civil Rights Act of 1991, a Title VII or ADA plaintiff may recover damages by showing that the defendant engaged in discrimination "with malice or with reckless indifference to [his or her] federally protected rights." *See* 42 U.S.C. § 1981a(b)(1). *See also* Model Instruction 4.53, *supra*, on punitive damages and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In 1999, the United States Supreme Court explained that the terms "malice" and "reckless" ultimately focus on the actor's state of mind. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535 (1999). The Court added that the terms pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. *Id.* To be liable for punitive damages, the employer must at least discriminate in the face of a perceived risk that its actions will violate federal law. *Id.* at 536. Rejecting the conclusion of the lower court that punitive damages were limited to cases involving intentional discrimination of an "egregious" nature, the Court held that a plaintiff is not required to show egregious or outrageous discrimination independent of the employer's state of mind. *Id.* at 546.

The *Kolstad* case also established a good-faith defense to place limits on an employer's vicarious liability for punitive damages. Recognizing that Title VII and the ADA are both efforts to promote prevention of discrimination as well as remediation, the Court held that an employer may not be vicariously liable for the discriminatory decisions of managerial agents where those decisions are contrary to the employer's good faith efforts to comply with Title VII or the ADA. *Id.* at 545. The Court does not clarify which party has the burden of proof on the issue of good faith.

For cases involving the provision of a reasonable accommodation (*see supra* Model Instruction 5.51C), the plaintiff may not recover punitive damages if the defendant demonstrated

"good faith efforts" to arrive at a reasonable accommodation with the plaintiff. *See infra* Model Instruction 5.55.

Under the ADA, as amended by the Civil Rights Act of 1991, the upper limit on an award including punitive and compensatory damages is $300,000. *See* 42 U.S.C. § 1981a(b)(3) (limiting the sum of compensatory and punitive damages awards depending on the size of the employer). For a discussion of submitting punitive damages to the jury under both state and federal law, *see Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 575-78 (8th Cir. 1997).

This instruction attempts to incorporate the constitutionally relevant principles set forth by the Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459-62 (1993). In *State Farm*, 538 U.S. at 417, the court observed: "We have admonished that '[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.'" (quoting *Honda Motor*, 512 U.S. at 432). *See Baker v. John Morrell & Co.*, 266 F. Supp. 2d 909, 961 (N.D. Iowa 2003), *aff'd*, 382 F.3d 816 (8th Cir. 2004), and *In Re Exxon Valdez*, 296 F. Supp. 2d 1071, 1080 (D. Alaska 2004), for examples of punitive damages instructions in which the court attempted to incorporate constitutional standards.

The last paragraph is based on *State Farm*, 538 U.S. at 421, in which the court held that: "A state cannot punish a defendant for conduct that may have been lawful where it occurred…Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." The court specifically mandated that: "A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm*, 538 U.S. at 422.

5.55 "GOOD FAITH" DEFENSE TO COMPENSATORY AND PUNITIVE DAMAGES

If you find in favor of the plaintiff under Instruction ___,[1] then you must answer the following question in the verdict form(s): Has it been proved[2] that the defendant made a good faith effort and consulted with the plaintiff, to identify and make a reasonable accommodation?

Notes on Use

1. Fill in the number or title of the "reasonable accommodation" essential elements instruction here (Model Instruction 5.51C, *supra*).

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

Committee Comments

This instruction is designed for use in cases where a discriminatory practice involves the provision of a reasonable accommodation. The language is derived from 42 U.S.C. § 1981a(a)(3), which provides that the plaintiff may not recover damages if the defendant "demonstrates good faith efforts" to arrive at a reasonable accommodation with the plaintiff.

If the jury answers the above interrogatory in the affirmative, the plaintiff may still be entitled to attorneys' fees and nominal damages.

5.56 BUSINESS JUDGMENT

Committee Comments

See infra Model Instruction 5.94.

5.57 CONSTRUCTIVE DISCHARGE

Committee Comments

See infra Model Instruction No. 5.93.

5.60 RETALIATION UNDER EMPLOYMENT DISCRIMINATION STATUTES

Introductory Comment

The following instructions are designed for use in cases where the plaintiff alleges that he or she was discharged or otherwise retaliated against because he or she opposed an unlawful employment practice, or "participated in any manner" in a proceeding under one of the discrimination statutes. Title VII, the Age Discrimination in Employment Act, The Americans With Disabilities Act, the Family and Medical Leave Act, and other federal employment laws expressly prohibit retaliation against employees who engage in "protected activity." *See, e.g.*, 42 U.S.C. § 2000e-3 (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 1223 (ADA); 29 U.S.C. § 2615 (FMLA). In addition, 42 U.S.C. § 1981 has been construed to prohibit retaliation against employees who engage in protected opposition to racial discrimination. *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1059 (8th Cir. 1997). Moreover, the anti-retaliation laws may, in some circumstances, extend protection to cover "third-party reprisals," in which an employer takes adverse action against one individual because of that person's close relationship with another individual who engaged in protected activity. *See Thompson v. North America Stainless, LP*, ___ U.S. ___, (2011) (where employee engages in protected activity, and employer retaliates by discharging employee's fiance, fiance is an aggrieved person with standing to sue under Title VII's anti-retaliation provision).

These instructions are designed to submit the issue of liability in a retaliation case under Title VII and other federal discrimination laws. To establish a claim of retaliation, the plaintiff must show (1) he or she engaged in a "protected activity," (2) the employer took or engaged in a materially adverse action, and (3) a causal connection existed between the protected activity and the materially adverse action. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68, 126 S. Ct. 2405, 2414-15 (2006); *see, e.g., Higgins v. Gonzales*, 481 F.3d 578, 589 (8th Cir. 2007). An action is "materially adverse" if "it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," *Burlington,* 548 U.S. at 68; *Vajdl v. Mesabi Academy of Kidspeace, Inc.*, 484 F.3d 546, 552 (8th Cir. 2007).

Protected Activity: Opposition

A retaliation plaintiff does not need to prove that the underlying employment practice by the employer was unlawful; instead, employees are protected from retaliation if they oppose an employment practice which they reasonably and in good faith believe to be unlawful. *See Clark County School District v. Breeden*, 532 U.S. 268 (2001); *Wentz v. Maryland Cas. Co.*, 869 F.2d 1153, 1155 (8th Cir. 1989) (ADEA case: "Contrary to the district court's ruling . . . to prove that he engaged in protected activity, Wentz need not establish that the conduct he opposed was . . . discriminatory.").

In order to be "protected activity," the employee's complaint must relate to unlawful employment practices; opposition to alleged discrimination against students or customers is not protected because it does not relate to an unlawful employment practice. *Artis v. Francis Howell*, 161 F.3d 1178 (8th Cir. 1998). As a general proposition, however, the threshold for engaging in "protected activity" is fairly low: the touchstone is simply whether the employee had a reasonable, good faith belief that the employer had committed an unlawful employment

practice. *Stuart v. General Motors Corp.*, 217 F.3d 621, 634 (8th Cir. 2000); *Buettner v. Eastern Arch Coal Sales Co.*, 216 F.3d 707, 714 (8th Cir. 2000); *Wentz*, 869 F.2d at 1155.

Protected Activity: Participation

In addition to prohibiting retaliation based on an employee's "opposition" to what he or she reasonably believes to be an unlawful employment practice, Title VII and other federal employment laws protect employees from retaliation based on their "participation" in proceedings under these statutes. *E.g.*, 42 U.S.C. § 2000e-3 (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203 (ADA). *Cross v. Cleaver*, 142 F.3d 1059, 1071 (8th Cir. 1988). Protected "participation" appears to include filing a charge with the EEOC (or a parallel state or local agency), filing a lawsuit under one of the federal employment statutes, or serving as a witness in an EEOC case or discrimination lawsuit. Unlike "opposition" cases, employees who "participate" in these proceedings appear to have absolute protection from retaliation, irrespective of whether the underlying claim was made reasonably and in good faith. *Benson v. Little Rock Hilton Inn*, 742 F.2d 414 (8th Cir. 1984).

Materially Adverse Action

To qualify as unlawful retaliation, the employer must have taken a "materially adverse" action. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53,67-68, 126 S. Ct. 2405, 2414-15 (2006). To be "materially adverse," the plaintiff must show that a reasonable employee in plaintiff's position might well have been "dissuaded" from filing or supporting a charge of discrimination. *Id.* at 68. This is an objective standard. *Id*.

The requisite "materially adverse" action is not limited to actions that affect the terms and conditions of employment *Id.* Indeed, it extends beyond workplace and employment-related acts and harm. *Id.* On the other hand, trivial actions are not materially adverse. *Id.* at 1215-16. Petty slights, minor annoyances, or a simple lack of good manners normally are not sufficient to demonstrate that an action is materially adverse. *Id.* Both the action and its context must be examined, as acts that may be immaterial in some situations may be material in others. *Id.; see Clegg v. Arkansas Dept. of Correction*, 2007 WL 2296414 (8th Cir. 2007); *Stewart v. Independent Sch. Dist. No.* 196, 481 F.3d 1034 (8th Cir. 2007). An employer's actions may be considered "cumulatively" -- "extreme, systematic retaliatory conduct" may be considered materially adverse. *Devin v. Schwan's Home Service, Inc*., 2007 WL 1948310 (8th Cir. 2007).

Causal Connection

Plaintiff must show there was a causal connection between the plaintiff's protected activity and the employer's materially adverse action. It has been held that timing alone may be insufficient to establish causation. *Compare Bradley v. Widnall*, 232 F.3d 626 (8th Cir. 2000); *Scroggins v. University of Minnesota*, 221 F.3d 1042 (8th Cir. 2000), *with Bassett v. City of Minneapolis*, 211 F.3d 1097, 1105 (8th Cir. 2000); *see also Smith v. St. Louis University*, 109 F.3d 1261, 1266 (8th Cir. 1997) ("Passage of time between events does not by itself foreclose a claim of retaliation"). The proximity between the plaintiff's protected activity and the employer's materially adverse action often is a strong circumstantial factor. *Smith*, 109 F.3d at

1266; *Bassett*, 211 F.3d at 1105. In *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273 (2001), the Supreme Court noted that the "cases that accept mere temporal proximity between an employer's knowledge of protected activity" and a materially adverse employment action "as sufficient evidence of casualty to establish a prima facie case uniformly hold that the temporal proximity must be 'very close.'"

Standard for Causation

Under Title VII, as amended by the Civil Rights Act of 1991, the standard for causation to establish liability for *discrimination* is whether discriminatory intent was a "motivating factor" in the employer's decision. 42 U.S.C. § 2000e-2(m) (pretext cases); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *see also Pedigo v. P.A.M. Transp. Inc.*, 60 F.3d 1300 (8th Cir. 1995) (applying "motivating factor" causation standard in ADA case). However, the Eighth Circuit has noted that the Civil Rights Act of 1991 did not modify the standard for liability in Title VII retaliation cases and, accordingly, the plaintiff must show that retaliation was a "determining factor" in the employer's challenged decision. *Van Horn v. Best Buy Stores, L.P.*, 526 F.3d 1144, 1148 (8th Cir. 2008); *Carrington v. City of Des Moines, Iowa*, 481 F.3d 1046, 1053 (8th Cir. 2007). *But cf. Warren v. Prejean*, 301 F.3d 893, 900-01 (8th Cir. 2002) ("[i]nstructing the jury that Warren must prove by a preponderance of the evidence that her sex and grievance were motivating factors in DYS' decision to discharge her, fairly and adequately reflects the applicable law of this circuit") (emphasis added). With respect to retaliation cases under other statutes such as the ADEA, the Committee believes that the "determining factor" standard should be used unless and until the case law indicates otherwise or, in the alternative, the district court may use the special interrogatories at 5.92 to obtain findings to both standards. Neither the Supreme Court nor the Eighth Circuit has ruled on this issue as of the publication date for these instructions.

Remedies and Verdict Forms

Lawyers and judges should utilize the damages instructions and verdict forms which apply to the type of discrimination in question. In other words, in a Title VII retaliation case (and subject to the causation standard issue discussed above), the court should use *supra* Model Instructions 5.01A *et seq.*; in an ADEA retaliation case, the court should use *supra* Model Instructions 5.11A *et seq.*; and so on.

The following instructions are patterned on a situation where the plaintiff claims retaliation based on his or her opposition to alleged race discrimination.

5.61 RETALIATION FOR PARTICIPATION IN PROCEEDINGS UNDER EMPLOYMENT STATUTES

Your verdict must be for the plaintiff and against the defendant on the plaintiff's retaliation claim if all the following elements have been proved[1]:

First, the plaintiff [filed an EEOC charge alleging (race discrimination)][2]; and

Second, the defendant (discharged, transferred, reassigned)[3] the plaintiff; and

[*Third*, the plaintiff's (discharge, transfer, reassignment) might well persuade another reasonable employee in the same or similar circumstances not to [file an EEOC charge]][4]; and

[*Third, Fourth],* the plaintiff's [filing of an EEOC charge] was a determining factor[5] in the defendant's decision[6] to (discharge, transfer, reassign) the plaintiff.

If any of the above elements has not been proved, your verdict must be for the defendant and you need not proceed further in considering this claim.

"The [filing of an EEOC charge] was a determining factor" only if the defendant would not have discharged the plaintiff but for the plaintiff's filing of an EEOC charge; it does not require that the filing of an EEOC charge was the only reason for the decision made by the defendant.[7] [You may find that the plaintiff's [filing of an EEOC charge] [was a determining factor] in the defendant's (decision) if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.][8]

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Describe the protected conduct and select the appropriate terms depending upon whether the plaintiff's underlying complaint involved discrimination based on race, gender, age, disability, etc.

3. Select the appropriate term depending upon whether the alleged retaliatory action involved discharge, demotion, failure to promote, transfer, suspension, etc.

4. Only submit this paragraph when the parties dispute whether a decision or act was "materially adverse." *See supra* Introductory Comments. The Committee elected not to use the phrase "materially adverse" directly in the elements instruction for simplicity. Actual use of the phrase "materially adverse" in the elements instruction may be preferred in some instances. The Committee recommends defining "materially adverse" in the instruction in this instance.

5. See the discussion in the introductory comments, Section 5.60, regarding the standard for liability in retaliation cases. This instruction assumes retaliation under Title VII (race, creed, color, sex, etc.). If retaliation is based on something else, *see* the Introductory Comments in section 5.60.

6. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

7. This definition of the phrase, "the filing of an EEOC charge was a determining factor" is based on *Grebin v. Sioux Falls Indep. School Dist. No. 49-5*, 779 F.2d 18, 20 n.1 (8th Cir. 1985).

8. This sentence may be added, if appropriate. *See* Model Instruction 5.95, *infra*, and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

5.62 RETALIATION FOR OPPOSITION TO HARASSMENT OR DISCRIMINATION

Your verdict must be for the plaintiff and against the defendant on the plaintiff's retaliation claim if all the following elements have been proved[1]:

First, the plaintiff complained to the defendant that [(he) (she) (name of third party)][2] was being (harassed/discriminated against)[3] on the basis of (race)[4]; and

Second, the plaintiff reasonably believed that [(he) (she) (name of third party)] was being (harassed/discriminated against)[3] on the basis of (race)[5]; and

Third, the defendant (discharged, transferred, reassigned)[6] the plaintiff;

[Fourth, the (transfer, reassignment) might well persuade a reasonable person in the same or similar circumstances not to complain about (harassment/discrimination)][7]; and

Fourth, the plaintiff's complaint of (racial harassment) (race discrimination) was a (determining)[8] factor in the defendant's decision to (discharge, transfer, reassign) the plaintiff.

If any of the above elements has not been proved, your verdict must be for the defendant and you need not proceed further in considering this claim.

"The plaintiff's complaint of (harassment/discrimination) was a determining factor" only if the defendant would not have discharged the plaintiff but for the plaintiff's complaint of (discrimination/harassment); it does not require that the complaint of (discrimination/harassment) was the only reason for the decision made by the defendant.[9] [You may find that the plaintiff's [filing of an EEOC charge] [was a determining factor] in the defendant's (decision)[10] if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.] [11]

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Select the appropriate term depending upon whether the plaintiff complained about discrimination toward himself or herself or a third party.

3. Select the appropriate term depending on whether the plaintiff's underlying complaint involved harassment or an allegedly discriminatory employment decision.

4. Select the appropriate term depending upon whether the underlying complaint was based on race, gender, age, disability, etc.

5. The plaintiff need not prove that the underlying employment practice by the employer was, in fact, unlawful. Instead, employees are protected if they opposed an employment practice which they reasonably and in good faith believe to be unlawful. Only submit this paragraph if there is evidence to support a factual dispute as to whether the plaintiff was complaining of or opposing discrimination in good faith. *See supra* Introductory Comments.

6. Select the appropriate term depending upon whether the allegedly retaliatory action involved discharge, demotion, failure to promote, reassignment, suspension, etc.

7. Only submit this paragraph when the parties dispute whether a decision or act was "materially adverse." The Committee elected not to use the phrase "materially adverse" directly in the elements instruction for simplicity. Actual use of the phrase "materially adverse" in the elements instruction may be preferred in some instances. The Committee recommends defining "materially adverse" in the instruction in this instance. To qualify as unlawful retaliation, the employer must have taken a "materially adverse" action. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68, 126 S.Ct. 2405, 2414-15 (2006). To be "materially adverse," the plaintiff must show that a reasonable employee in plaintiff's position might well have been "dissuaded" from complaining about discrimination or harassment. *Id*. at 68. This is an objective standard. *Id*. "By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, [the Supreme Court] believe[s] this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination." *Id*. at 69-70. Ultimate employment decisions such as demotion and discharge generally meet this standard. *Id*. at 60.

8. See the discussion in the introductory comments, Section 5.60, regarding the standard for liability in retaliation cases. This instruction assumes retaliation under Title VII (race, creed, color, sex, etc.). If retaliation is based on something else, *see* the Introductory Comments in Section 5.60.

9. This definition of the phrase, "complaint of (harassment/discrimination) was a determining factor" is based on *Grebin v. Sioux Falls Indep. School Dist. No. 49-5*, 779 F.2d 18, 20 n.1 (8th Cir. 1985).

10. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

11. This sentence may be added, if appropriate. *See* Model Instruction 5.95, *infra*, and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Employment Cases - Retaliation Under Employment Discrimination Statutes

5.63 RETALIATION - THIRD PARTY REPRISAL

Your verdict must be for the plaintiff and against the defendant on the plaintiff's retaliation claim if all the following elements have been proved[1]:

First, the plaintiff had a [specify nature of relationship] with [NAME OF PERSON WHO COMPLAINED],[2]

Second, [NAME OF PERSON WHO COMPLAINED] [filed an EEOC charge alleging (race discrimination)][3];

Third, the defendant (describe adverse employment action such as discharged, transferred, reassigned)[4] the plaintiff;

Fourth, the plaintiff's (transfer, reassignment) might well persuade a reasonable person in the same or similar circumstances as [NAME OF PERSON WHO COMPLAINED] not to (file an EEOC charge)[5]; and

Fifth, [NAME OF PERSON WHO COMPLAINED]'s [filing of an EEOC charge] was a determining factor[6] in the defendant's decision to (discharge, transfer, reassign) the plaintiff.

If any of the above elements has not been proved, your verdict must be for the defendant and you need not proceed further in considering this claim.

"The [filing of an EEOC charge] was a determining factor" only if the defendant would not have discharged the plaintiff but for the filing of an EEOC charge; it does not require that the filing of an EEOC charge was the only reason for the decision made by the defendant.[7] [You may find that [NAME OF PERSON WHO COMPLAINED]'s [filing of an EEOC charge] [was a determining factor] in the defendant's (decision)[8] if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.] [9]

Notes on Use

This instruction is based on Model Instruction 5.61, and is intended to submit a third-party reprisal claim in which the plaintiff/employee was allegedly subjected to unlawful

retaliation because another employee, with whom the plaintiff had a relationship, engaged in protected participation.

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Insert the name of the individual alleged to have engaged in the protected activity, and describe the nature of the relationship with the plaintiff. In *Thompson v. North American Stainless, LP*, ___ U.S. ___, 131 S.Ct. 863 (2011), the Court held that, where an employee engages in protected activity, and the employer retaliates by discharging the employee's fiancé, the fiancé is an aggrieved person with standing to sue under Title VII's anti-retaliation provision. However, the Court expressly "decline[d] to identify a fixed class of relationships for which third-party reprisals are unlawful. We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize." 131 S.Ct. at 868. The trial court must determine whether the relationship at issue satisfies the *Thompson* standard, and this paragraph should be used if there is a factual dispute as to the nature of the relationship.

3. Describe the protected conduct and select the appropriate terms depending upon whether the plaintiff's underlying complaint involved discrimination based on race, gender, age, disability, etc.

4. Select the appropriate term depending upon whether the alleged retaliatory action involved discharge, demotion, failure to promote, transfer, suspension, etc.

5. Only submit this paragraph when the parties dispute whether a decision or act was "materially adverse." The Committee elected not to use the phrase "materially adverse" directly in the elements instruction for simplicity. Actual use of the phrase "materially adverse" in the elements instruction may be preferred in some instances. The Committee recommends defining "materially adverse" in the instruction in this instance. To qualify as unlawful retaliation, the employer must have taken a "materially adverse" action. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68, 126 S.Ct. 2405, 2414-15 (2006). To be "materially adverse," the plaintiff must show that a reasonable employee in plaintiff's position might well have been "dissuaded" from complaining about discrimination or harassment. *Id*. at 68. This is an objective standard. *Id*. "By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, [the Supreme Court] believe[s] this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination." *Id*. at 69-70. Ultimate employment decisions such as demotion and discharge generally meet this standard. *Id*. at 60.

6. See the discussion in the introductory comments, Section 5.60, regarding the standard for liability in retaliation cases. This instruction assumes retaliation under Title VII (race, creed, color, sex, etc.). If retaliation is based on something else, *see* the Introductory Comments in Section 5.60.

7. This definition of the phrase, "the filing of an EEOC charge was a determining factor" is based on *Grebin v. Sioux Falls Indep. School Dist. No. 49-5*, 779 F.2d 18, 20 n.1 (8th Cir. 1985).

8. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

9. This sentence may be added, if appropriate. *See* Model Instruction 5.95, *infra*, and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

5.64 RETALIATION - THIRD PARTY REPRISAL FOR OPPOSITION TO HARASSMENT OR DISCRIMINATION

Your verdict must be for the plaintiff and against the defendant on the plaintiff's retaliation claim if all the following elements have been proved[1]:

First, the plaintiff had a [specify nature of relationship] with [NAME OF PERSON WHO COMPLAINED],[2]

Second, [NAME OF PERSON WHO COMPLAINED] complained to the defendant that [(he) (she) (name of third party)][3] was being (harassed/discriminated against)[4] on the basis of (race)][5]; and

Third, [NAME OF PERSON WHO COMPLAINED] reasonably believed that [(he) (she) (name of third party)] was being (harassed/discriminated against)[6] on the basis of (race); and

Fourth, the defendant (discharged, transferred, reassigned)[7] the plaintiff;

[*Fifth*, the (transfer, reassignment) might well persuade a reasonable person in the same or similar circumstances not to complain about (harassment/discrimination)]; and[8]

Sixth, [NAME OF PERSON WHO COMPLAINED]'s complaint of (racial harassment) (race discrimination) was a (determining)[9] factor in the defendant's decision to (discharge, transfer, reassign) the plaintiff.

If any of the above elements has not been proved, your verdict must be for the defendant and you need not proceed further in considering this claim.

The "complaint of (harassment/discrimination) was a determining factor" only if the defendant would not have discharged the plaintiff but for the complaint of (discrimination/harassment); it does not require that the complaint of (discrimination/harassment) was the only reason for the decision made by the defendant.[10] [You may find that [NAME OF PERSON WHO COMPLAINED]'s [complaint of discrimination]

[was a determining factor] in the defendant's (decision)[11] if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.] [12]

Notes on Use

This instruction is based on Model Instruction 5.62, and is intended to submit a third-party reprisal claim in which the plaintiff/employee was allegedly subjected to unlawful retaliation because another employee, with whom the plaintiff had a relationship, engaged in protected opposition.

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Insert the name of the individual alleged to have engaged in the protected activity, and describe the nature of the relationship with the plaintiff. In *Thompson v. North American Stainless, LP*, ___ U.S. ___, 131 S.Ct. 863 (2011), the Court held that, where an employee engages in protected activity, and the employer retaliates by discharging the employee's fiance, the fiance is an aggrieved person with standing to sue under Title VII's anti-retaliation provision. However, the Court expressly "decline[d] to identify a fixed class of relationships for which third-party reprisals are unlawful. We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize." 131 S.Ct. at 868. The trial court must determine whether the relationship at issue satisfies the *Thompson* standard, and this paragraph should be used if there is a factual dispute as to the nature of the relationship.

3. Select the appropriate term depending upon whether the individual complained about discrimination toward himself or herself or a third party.

4. Select the appropriate term depending on whether the individual's underlying complaint involved harassment or an allegedly discriminatory employment decision.

5. Select the appropriate term depending upon whether the underlying complaint was based on race, gender, age, disability, etc.

6. The plaintiff need not prove that the underlying employment practice by the employer was, in fact, unlawful. Instead, employees are protected if they opposed an employment practice which they reasonably and in good faith believe to be unlawful. Only submit this paragraph if there is evidence to support a factual dispute as to whether the individual was complaining of or opposing discrimination in good faith. *See supra* Introductory Comments.

7. Select the appropriate term depending upon whether the allegedly retaliatory action involved discharge, demotion, failure to promote, reassignment, suspension, etc.

8. Only submit this paragraph when the parties dispute whether a decision or act was "materially adverse." The Committee elected not to use the phrase "materially adverse" directly in the elements instruction for simplicity. Actual use of the phrase "materially adverse" in the

elements instruction may be preferred in some instances. The Committee recommends defining "materially adverse" in the instruction in this instance To qualify as unlawful retaliation, the employer must have taken a "materially adverse" action. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68, 126 S. Ct. 2405, 2414-15 (2006). To be "materially adverse," the plaintiff must show that a reasonable employee in plaintiff's position might well have been "dissuaded" from complaining about discrimination or harassment. *Id.* at 68. This is an objective standard. *Id*. "By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, [the Supreme Court] believe[s] this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination." *Id*. at 69-70. Ultimate employment decisions such as demotion and discharge generally meet this standard. *Id*. at 60.

9. See the discussion in the introductory comments, Section 5.60, regarding the standard for liability in retaliation cases. This instruction assumes retaliation under Title VII (race, creed, color, sex, etc.). If retaliation is based on something else, *see* the Introductory Comments in Section 5.60.

10. This definition of the phrase, "complaint of (harassment/discrimination) was a determining factor" is based on *Grebin v. Sioux Falls Indep. School Dist. No. 49-5*, 779 F.2d 18, 20 n.1 (8th Cir. 1985).

11. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

12. This sentence may be added, if appropriate. *See* Model Instruction 5.95, *infra*, and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

5.70 FIRST AMENDMENT RETALIATION (42 U.S.C. § 1983)
Introductory Comment

The legal theory underlying First Amendment retaliation cases is that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983); *see also Pickering v. Board of Educ.*, 391 U.S. 563, 568-74 (1968); *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972); *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 283-84 (1977); *Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987); *Waters v. Churchill*, 511 U.S. 661 (1994). Although most First Amendment retaliation cases relate to the termination of the plaintiff's employment, they can involve demotions, suspensions, and other employment-related actions. *See, e.g., Stever v. Independent School Dist. No. 625*, 943 F.2d 845 (8th Cir. 1991) (transfer); *Powell v. Basham*, 921 F.2d 165, 167-68 (8th Cir. 1990) (denial of promotion); *Duckworth v. Ford*, 995 F.2d 858, 860-61 (8th Cir. 1993) (harassment). Generally, there are three issues in First Amendment retaliation cases: whether the plaintiff's speech was "protected activity" under the First Amendment; whether the plaintiff's speech was a motivating or substantial factor in the defendant's decision to terminate or otherwise impair the plaintiff's employment; and whether the defendant would have taken the same action irrespective of the plaintiff's speech. *E.g., Hamer v. Brown*, 831 F.2d 1398, 1401 (8th Cir. 1987); *Lewis v. Harrison School Dist.*, 805 F.2d 310, 313 (8th Cir. 1986). In view of the Supreme Court's decision in *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977), the model instruction on liability utilizes a motivating-factor/same-decision burden-shifting format in all First Amendment retaliation cases.

5.71 FIRST AMENDMENT RETALIATION - ELEMENTS (42 U.S.C. § 1983)

Your verdict must be for the plaintiff [and against defendant _____][1] [on the plaintiff's First Amendment retaliation claim][2] if the following elements have been proved[3]:

First, the defendant [discharged][4] the plaintiff; and

Second, the plaintiff's [here specifically describe the plaintiff's protected speech - *e.g.*, letter to the local newspaper][5] [was a motivating factor][6] [played a part][7]in the defendant's decision [to discharge][8] the plaintiff[; and

Third, the defendant was acting under color of law].[9]

However, your verdict must be for the defendant if any of the above elements has not been proved, or if it has been proved that the defendant would have [discharged] the plaintiff regardless of [(his) (her)] (letter to the local newspaper).[10] [You may find that the plaintiff's [letter to a local newspaper] [was a motivating factor] [played a part] in the defendant's (decision)[11] if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] not the real reason, but [(is) (are)] a pretext to hide discrimination.][12]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase “greater weight of the evidence” is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. This instruction is designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the instruction must be modified. Where the plaintiff resigned but claims a "constructive discharge," this instruction should be modified. *See infra* Model Instruction 5.93.

5. To avoid difficult questions regarding causation, it is very important to specifically describe the speech which forms the basis for the claim. Vague references to "the plaintiff's speech" or "the plaintiff's statements to the school board" often will be inadequate; instead, specific reference to the time, place and substance of the speech (*e.g.*, "the plaintiff's comments criticizing teacher salaries at the April 1992 school board meeting") is recommended. Whenever there is a genuine issue as to whether the plaintiff's speech was "protected" by the First Amendment, the trial court should be extremely careful in making the record regarding this issue. If the trial court can readily determine that the plaintiff's speech was "protected" by the

First Amendment without resort to jury findings, a succinct description of the protected speech should be inserted in the elements instruction. By way of example, the model instruction makes reference to the plaintiff's "letter to the local newspaper." However, if there is an underlying factual dispute impacting whether the plaintiff's speech was protected, any questions of fact should be submitted to the jury through special interrogatories or other special instructional devices. *See Cook v. Tadros*, 312 F.3d 386, 388 (8th Cir. 2002); *Shands v. City of Kennett*, 993 F.2d 1337, 1342-43 (8th Cir. 1993).

As suggested by *Shands v. City of Kennett*, 993 F.2d 1337, 1342-43 (8th Cir. 1993), the trial court may separately submit special interrogatories to elicit jury findings as to the relevant balancing factors, while reserving judgment on the legal impact of those findings. For a sample set of interrogatories, *see infra* Model Instruction 5.71A. The use of special interrogatories on these model instructions was approved in *Cook v. Tadros*, 312 F.3d 386, 388 (8th Cir. 2002). If the trial court takes this approach, it should postpone its entry of judgment while it fully evaluates the implications of the jury's findings of fact. *See infra* Model Instruction 5.73A. Alternatively, if the essential jury issue can be crystallized in the form of a single essential element which the plaintiff must prove, it may be included in the elements instruction. For example, in *McGee v. South Pemiscot School Dist.*, 712 F.2d 339, 342 (8th Cir. 1983), the trial court instructed the jury that its verdict had to be for the defendants if it believed that the plaintiff's "exercise of free speech had a disruptive impact upon the [school district's] employees."

6. The Committee believes that the term "motivating factor" should be defined. *See infra* Instruction 5.96.

7. *See infra* Model Instruction 5.96, which defines “motivating factor” in terms of whether the characteristic “played a part or a role” in the defendant’s decision. The phrase “motivating factor” need not be defined if the definition itself is used in the element instruction.

8. The bracketed term should be consistent with the first element. Accordingly, this instruction must be modified in a "failure-to-hire," "failure-to-promote," or "demotion" case.

9. Use this language if the issue of whether the defendant was acting under color of state law, a prerequisite to a claim under 42 U.S.C. § 1983. Typically, this element will be conceded by the defendant. If so, it need not be included in this instruction.

10. If appropriate, this instruction may be modified to include a "business judgment" and/or a "pretext" instruction. *See infra* Model Instructions 5.94, 5.95.

11. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

12. This sentence may be added, if appropriate. *See* Model Instruction 5.95, *infra*, and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states “[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.”

Employment Cases - First Amendment Retaliation

Committee Comments

OVERVIEW

Public employers may not retaliate against their employees for speaking out on matters of public concern unless their speech contains knowingly or recklessly false statements, undermines the ability of the employee to function, or interferes with the operation of the governmental entity. *McGee v. South Pemiscot School Dist.*, 712 F.2d 339, 342 (8th Cir. 1983); *see also Duckworth v. Ford*, 995 F.2d 858, 861 (8th Cir. 1993) (holding that the defendants were not entitled to qualified immunity in First Amendment case); *Shands v. City of Kennett*, 993 F.2d 1337, 1344-46 (8th Cir. 1993) (affirming j.n.o.v. for employer where the plaintiff's comments regarding personnel and safety issues were not protected by First Amendment); *Bausworth v. Hazelwood School Dist.*, 986 F.2d 1197 (8th Cir. 1993) (affirming summary judgment for employer where the plaintiff's comments regarding school district policy were not "protected activity"); *Buzek v. County of Saunders*, 972 F.2d 992 (8th Cir. 1992) (individual defendant was not entitled to qualified immunity defense in First Amendment case); *Bartlett v. Fischer*, 972 F.2d 911 (8th Cir. 1992) (approving qualified immunity defense in First Amendment case); *Stever v. Independent School Dist. No. 625*, 943 F.2d 845 (8th Cir. 1991) (analyzing "protected speech" and "causation" issues); *Powell v. Basham*, 921 F.2d 165 (8th Cir. 1990) (holding that public employee's criticism of employer's promotion process was "protected activity"); *Crain v. Board of Police Comm'rs*, 920 F.2d 1402 (8th Cir. 1990) (affirming summary judgment where the plaintiffs' internal grievances did not rise to the level of "protected speech"); *Hoffmann v. Mayor of City of Liberty*, 905 F.2d 229 (8th Cir. 1990) (employee grievance was not protected by the First Amendment); *Darnell v. Ford*, 903 F.2d 556 (8th Cir. 1990) (ruling that state police officer's support of a certain candidate for the position of Highway Patrol Superintendent was "protected activity").

PRIMARY ISSUES IN FIRST AMENDMENT CASES

Generally, there are three primary issues in First Amendment retaliation cases: (1) whether the plaintiff's speech was "protected activity" under the First Amendment; (2) whether the plaintiff's protected activity was a substantial or motivating factor in the defendant's decision to terminate or otherwise impair the plaintiff's employment; and (3) whether the defendant would have taken the same action irrespective of the plaintiff's protected activity. *Hamer v. Brown*, 831 F.2d 1398, 1401 (8th Cir. 1987); *Lewis v. Harrison School Dist.*, 805 F.2d 310, 313 (8th Cir. 1986); *Cox v. Dardanelle Public School Dist.*, 790 F.2d 668, 672 (8th Cir. 1986). The determination of whether the plaintiff's speech was "protected" presents a question of law for the court. *E.g., Bausworth v. Hazelwood School Dist.*, 986 F.2d 1197, 1198 (8th Cir. 1993); *Lewis v. Harrison School Dist.*, 805 F.2d 310, 313 (8th Cir. 1986).

SECONDARY ISSUES RELATING TO "PROTECTED SPEECH" DETERMINATION

In general, the question of whether the plaintiff's speech was "protected" depends upon two subissues: (1) whether the plaintiff's speech addressed a matter of "public concern"; and (2) whether, in balancing the competing interests, the plaintiff's interest in commenting on matters of public concern outweighs the government's interest in rendering efficient services to

its constituents. *Waters v. Churchill*, 511 U.S. 661 (1994); *Hamer v. Brown*, 831 F.2d 1398, 1401-02 (8th Cir. 1987); *Cox v. Dardanelle Public School Dist.*, 790 F.2d 668, 672 (8th Cir. 1986). In many cases, the trial court will be able to determine whether the plaintiff's speech was protected without much difficulty. However, as discussed below, complicated issues can arise when there are factual disputes underlying this issue. *See Shands v. City of Kennett*, 993 F.2d 1337, 1342 (8th Cir. 1993).

a. *Public Concern*

Analysis of whether the plaintiff's speech addressed a matter of "public concern" requires consideration of the plaintiff's role in conveying the speech, whether the plaintiff attempted to communicate to the public at large, and whether the plaintiff was attempting to generate public debate or merely pursuing personal gain. *Bausworth v. Hazelwood School Dist.*, 986 F.2d 1197 (8th Cir. 1993); *but cf. Derrickson v. Board of Educ.*, 703 F.2d 309, 316 (8th Cir. 1983) (speech can be protected even if it was "privately express[ed]" to the plaintiff's superiors); *Darnell v. Ford*, 903 F.2d 556, 563 (8th Cir. 1990) (speech was protected even if it was motivated by the plaintiff's self-interest); *see generally Connick v. Myers*, 461 U.S. 138, 147 (1983) (speech is not protected by First Amendment if the plaintiff speaks merely as an employee upon matters only of personal interest). Determination of whether the plaintiff's speech addressed a matter of public concern appears to fall exclusively within the province of the court. *See Lewis v. Harrison School Dist.*, 805 F.2d 310, 312-13 (8th Cir. 1986) (trial court erred in following jury's finding that the plaintiff's speech did not address a matter of public concern).

b. *Balancing of Interests*

Analysis of the "balancing" issue depends upon a variety of factors, which traditionally have included the following: the need for harmony in the workplace; whether the governmental entity's mission required a close working relationship between the plaintiff and his or her co-workers when the speech in question has caused or could have caused deterioration in the plaintiff's work relationships; the time, place, and manner of the speech; the context in which the dispute arose; the degree of public interest in the speech; and whether the speech impaired the plaintiff's ability to perform his or her duties. *Shands v. City of Kennett*, 993 F.2d 1337, 1344 (8th Cir. 1993); *Hamer v. Brown*, 831 F.2d 1398, 1402 (8th Cir. 1987); *see generally Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). This balancing process is flexible, and the weight to be given to any one factor depends upon the specific circumstances of each case. *Shands v. City of Kennett*, 993 F.2d 1337, 1344 (8th Cir. 1993).

c. *Balancing and Jury Instructions*

Although the balancing process ultimately is a function for the court, Eighth Circuit case law indicates that subsidiary factual issues must be submitted to the jury. For example, in *McGee v. South Pemiscot School Dist.*, 712 F.2d 339, 342 (8th Cir. 1983), the court stated that "[i]t was for the jury to decide whether the [plaintiff's] letter [to the editor] created disharmony between McGee and his immediate supervisors." Likewise, in *Lewis v. Harrison School Dist.*, 805 F.2d 310, 315 (8th Cir. 1986), the Eighth Circuit ruled that it was error for the trial court to

disregard the jury's special interrogatory findings on certain balancing issues. In *Shands v. City of Kennett*, 993 F.2d 1337 (8th Cir. 1993), the court stated that:

> Any underlying factual disputes concerning whether the plaintiff's speech is protected . . . should be submitted to the jury through special interrogatories or special verdict forms. For example, the jury should decide factual questions such as the nature and substance of the plaintiff's speech activity, and whether the speech created disharmony in the work place. The trial court should then combine the jury's factual findings with its legal conclusions in determining whether the plaintiff's speech is protected.

Id. at 1342-43 (citations omitted). Accordingly, this model instruction may be supplemented with a set of special interrogatories or it may require modification to elicit specific jury findings on critical balancing issues such as "disharmony." *See infra* Model Instruction 5.71A n.2. The use of these special interrogatories was approved in *Cook v. Tadros*, 312 F.3d 386, 388 (8th Cir. 2002). Although the plaintiff appears to have the burden of proof as to whether the speech was "constitutionally protected," *see Cox v. Miller County R-1 School Dist.*, 951 F.2d 927, 931 (8th Cir. 1991) and *Stever v. Independent School Dist. No. 625*, 943 F.2d 845, 849-50 (8th Cir. 1991), it is unclear whether the plaintiff bears the burden of proof as to each subsidiary factor.

When the trial court submits special interrogatories to the jury, it bears emphasis that the ultimate decision as to whether the plaintiff's speech was protected is a question of law for the court. *E.g., Lewis v. Harrison School Dist.*, 805 F.2d 310, 312-13 (8th Cir. 1986) (trial court erred in following jury's finding that speech did not address matter of public concern); *Bowman v. Pulaski County Special School Dist.*, 723 F.2d 640, 644-45 (8th Cir. 1983) (the plaintiff's speech was protected even though it "contributed to the turmoil" at the workplace). It also bears emphasis that the defendant's reasonable perception of the critical events is controlling; the jury cannot be allowed to substitute its judgment as to what "really happened" for the honest and reasonable belief of the defendant. *Waters v. Churchill*, 511 U.S. 661 (1994.)

d. *Balancing and Qualified Immunity*

The need to address the balancing issue in jury instructions is most likely to arise in cases brought against municipalities, school districts, and other local governmental bodies which are not entitled to qualified immunity or Eleventh Amendment immunity. In contrast, Eighth Circuit case law suggests that *individual defendants* may have qualified immunity with respect to any jury-triable damages claims if the "balancing issue" becomes critical in a First Amendment case. *See Grantham v. Trickey*, 21 F.3d 289, 295 (8th Cir. 1994) (holding that individual defendants are entitled to qualified immunity where there is specific and unrefuted evidence that the employee's speech affected morale and substantially disrupted the work environment); *Bartlett v. Fisher*, 972 F.2d 911, 916 (8th Cir. 1992) (suggesting that qualified immunity from damages will apply whenever a First Amendment retaliation case involves the "balancing test"). *But cf. Duckworth v. Ford*, 995 F.2d 858, 861 (8th Cir. 1993) (rejecting individual defendants' qualified immunity defense in First Amendment case); *Buzek v. County of Saunders*, 972 F.2d 992 (8th Cir. 1992) (rejecting qualified immunity in First Amendment case where the defendant failed to

introduce evidence sufficient to invoke the balance test); *Powell v. Basham*, 921 F.2d 165, 167-68 (8th Cir. 1990) (rejecting qualified immunity defense in First Amendment wrongful discharge cases); *Lewis v. Harrison School Dist.*, 805 F.2d 310, 318 (8th Cir. 1986) (same). In *Waters v. Churchill*, 511 U.S. 661 (1994), the Supreme Court declined to address the issue of qualified immunity in First Amendment cases. In addition, state governmental bodies typically have Eleventh Amendment immunity from damages claims. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). Accordingly, when balancing issues arise in a case brought by a state employee, the defendants may have immunity from a claim for damages and, as a result, there would be no need for a jury trial or jury instructions.

MOTIVATION AND CAUSATION

If a plaintiff can make the required threshold showing that he or she engaged in protected activity, the remaining issues focus on the questions of motivation and causation: was the plaintiff's employment terminated or otherwise impaired because of his or her protected activity? In *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977), the Supreme Court introduced the "motivating-factor"/"same-decision" burden shifting format in First Amendment retaliation cases. On the issue of causation, it also should be noted that the Eighth Circuit has allowed a claim against a defendant who recommended the plaintiff's dismissal but lacked final decision-making authority. *Darnell v. Ford*, 903 F.2d 556, 561-62 (8th Cir. 1990). The Eighth Circuit also has allowed a claim against a school board for unknowingly carrying out a school principal's retaliatory recommendation. *Cox v. Dardanelle Pub. School Dist.*, 790 F.2d 668, 676 (8th Cir. 1986). In *Waters v. Churchill*, 511 U.S. 661 (1994), the Supreme Court ruled that a public employer does not violate the First Amendment if it honestly and reasonably believes reports by coworkers of unprotected conduct by the plaintiff; the Supreme Court did not address the situation where the public employer relied upon the tainted recommendation of a management-level employee.

5.71A FIRST AMENDMENT RETALIATION - SPECIAL INTERROGATORIES REGARDING "PROTECTED SPEECH" BALANCING ISSUES (42 U.S.C. § 1983)

To assist the Court in determining whether the plaintiff's [describe the speech upon which the plaintiff's claim is based--*e.g.*, "memo to Principal Jones dated January 24, 1989"][1] was protected by the First Amendment to the United States Constitution, you are directed to consider and answer the following questions:

1. Did the plaintiff's [memo to Principal Jones dated January 24, 1989] cause, or could it have caused, disharmony or disruption in the workplace?[2]

2. Did the plaintiff's [January 24, 1989, memo to Principal Jones] impair [(his) (her)] ability to perform [(his) (her)] duties?[3]

Please use the Supplemental Verdict Form to indicate your answers to these questions.[4]

Notes on Use

1. Describe the speech upon which the plaintiff bases his or her claim.

2. The first two factors mentioned in *Shands* relate to "the need for harmony in the office or work place" and "whether the government's responsibilities required a close working relationship to exist between the plaintiff and co-workers." *Shands*, 993 F.2d at 1344. The second factor mentioned in *Shands* addresses whether the plaintiff's speech caused or could have caused deterioration in the plaintiff's working relationships. *Shands*, 993 F.2d at 1344. This question is designed to test this issue.

3. Yet another balancing factor mentioned in *Shands* is whether the speech at issue impaired the plaintiff's ability to perform his or her assigned duties. *See Shands*, 993 F.2d at 1344. This question is designed to test this issue. As discussed in the Committee Comments, this list of questions is not required in all cases, nor is it all-inclusive. If other issues exist concerning the context or content of the plaintiff's speech, additional questions should be included.

4. The jury's answers to the special interrogatories should be recorded on a Supplemental Verdict Form. *See infra* Model Instruction 5.73A.

Committee Comments

The Eighth Circuit has indicated that, whenever the *Pickering* balancing process must be invoked to determine whether the plaintiff's speech was protected by the First Amendment, "[a]ny underlying factual disputes . . . should be submitted to the jury through special interrogatories or special verdict forms." *Shands v. City of Kennett*, 993 F.2d 1337, 1342 (8th Cir. 1993). This instruction is designed to meet the mandate of *Shands* and the use of special

interrogatories based on these model instructions was approved in *Cook v. Tadros*, 312 F.3d 386, 388 (8th Cir. 2002). *See generally* Committee Comments to Model Instruction 5.71, *supra*.

If there is a material dispute over the precise content of the plaintiff's speech, it appears that the issue must be resolved by the jury. In resolving any such factual dispute, deference must be given to the honest and reasonable perception of the defendant. *Waters v. Churchill*, 511 U.S. 661 (1994). Thus, if the defendant takes the position that it terminated the plaintiff based on a third-party report that the plaintiff engaged in unprotected insubordination, the following sequence of interrogatories may be appropriate:

1. Did the plaintiff say that [(his) (her)] supervisor was incompetent?

Yes _____ No _____

Note: If your answer is "yes," you should not answer Question No. 2. If your answer is "no," continue on the Question No. 2.

2. Did the defendant honestly and reasonably believe the report of [name the plaintiff's coworker or other source of third-party report] that the plaintiff had referred to [(his) (her)] supervisor as incompetent?

Yes _____ No _____

In general, it appears that the plaintiff has the burden of showing that his or her speech was constitutionally protected. *See Cox v. Miller County R-1 School Dist.*, 951 F.2d 927, 931 (8th Cir. 1991); *Stever v. Independent School Dist. No. 625*, 943 F.2d 845, 849-50 (8th Cir. 1991). However, it is unclear whether the plaintiff should bear the risk of nonpersuasion on every subsidiary factual issue. Accordingly, this instruction does not include any "burden of proof" language. It also should be noted that the ultimate balancing test rests within the province of the Court and that no particular factor is dispositive. *See Shands*, 993 F.2d at 1344, 1346.

5.72A FIRST AMENDMENT RETALIATION - ACTUAL DAMAGES (42 U.S.C. § 1983)

If you find in favor of the plaintiff under Instruction ____,[1] then you must award the plaintiff such sum as you find will fairly and justly compensate the plaintiff for any actual damages you find the plaintiff sustained as a direct result of the defendant's conduct as submitted in Instruction _____.[2] Actual damages include any wages or fringe benefits you find the plaintiff would have earned in [(his) (her)] employment with the defendant if [(he) (she)] had not been discharged on [fill in date of discharge], through the date of your verdict, *minus* the amount of earnings and benefits from other employment received by the plaintiff during that time.[3] Actual damages also may include [list damages supported by the evidence].[4]

[You are also instructed that the plaintiff has a duty under the law to "mitigate" [(his) (her)] damages--that is, to exercise reasonable diligence under the circumstances to minimize [(his) (her)] damages. Therefore, if it has ben proved[5] that the plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [(him) (her)], you must reduce [(his) (her)] damages by the amount [(he) (she)] reasonably could have avoided if [(he) (she)] had sought out or taken advantage of such an opportunity.][6] [Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.][7]

Notes on Use

1. Insert the number or title of the "essential element" instruction here.

2. When certain benefits, such as employer-subsidized health insurance benefits, are recoverable under the evidence, this instruction may be modified to explain to the jury the manner in which recovery for those benefits is to be calculated. Claims for lost benefits often present difficult issues as to the proper measure of recovery. *See Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 470 (8th Cir. 1989) (discussing different approaches). Some courts deny recovery for lost benefits unless the employee purchases substitute coverage, in which case the measure of damages is the employee's out-of-pocket expenses. *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 161 (7th Cir. 1981); *Pearce v. Carrier Corp.*, 966 F.2d 958 (5th Cir. 1992). Other courts permit the recovery of the amount the employer would have paid as premiums on the employee's behalf. *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 964-65 (4th Cir. 1985). The Committee expresses no view as to which approach is proper. This instruction also may be modified to exclude certain items which were mentioned during trial but are not recoverable because of an insufficiency of evidence or as a matter of law.

3. This sentence should be used to guide the jury in calculating the plaintiff's economic damages. In section 1983 cases, however, a prevailing plaintiff may recover actual damages for emotional distress and other personal injuries. *See Carey v. Piphus*, 435 U.S. 247 (1978). The words following "*minus*" are accurate only to the extent that they refer to employment that has been taken in lieu of the employment with the defendant. That is significant where, for example, the plaintiff had a part-time job with someone other than the defendant *before* the discharge and retained it after the discharge. In that circumstance, the amount of earnings and benefits from that part-time employment received after the discharge should not be deducted from the wages or fringe benefits the plaintiff would have earned with the defendant if he or she had not have been discharged, unless the part-time job was enlarged after the discharge. In such a case, the instruction should be modified to make it clear to the jury which income may be used to reduce the plaintiff's recovery.

4. In section 1983 cases, a prevailing plaintiff may recover damages for mental anguish and other personal injuries. The specific elements of damages that may be set forth in this instruction are similar to those found in the Civil Rights Act of 1991. *See* 42 U.S.C. § 1981a(b)(3). *See supra* Model Instructions 5.02A n.8 and 4.50A.

5. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

6. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Coleman v. City of Omaha*, 714 F.2d 804, 808 (8th Cir. 1983).

7. This paragraph may be given at the trial court's discretion.

Committee Comments

This instruction is designed to submit the standard back pay formula of lost wages and benefits reduced by interim earnings and benefits. *See Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808 (8th Cir. 1982). Moreover, because section 1983 damages are not limited to back pay, the instruction also permits the recovery of general damages for pain, suffering, humiliation, and the like.

In some cases, a discrimination plaintiff may be eligible for front pay. Because front pay is essentially an equitable remedy "in lieu of" reinstatement, front pay is an issue for the court, not the jury. *Excel Corp. v. Bosley*, 165 F.3d 635 (8th Cir. 1999). *See MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1060 (8th Cir. 1988); *Newhouse v. McCormick & Co.*, 110 F.3d 635, 641 (8th Cir. 1997) (front pay is an issue for the court, not the jury, in ADEA cases). If the trial court submits the issue of front pay to the jury, the jury's determination may be binding. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (ADEA case).

This instruction may be modified to articulate the types of interim earnings which should be offset against the plaintiff's back pay. For example, severance pay and wages from other employment ordinarily are offset against a back pay award. *See Krause v. Dresser Industries*, 910 F.2d 674, 680 (10th Cir. 1990); *Cornetta v. United States*, 851 F.2d 1372, 1381 (Fed. Cir.

1988); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). Unemployment compensation, Social Security benefits or pension benefits ordinarily are not offset against a back pay award. *See Doyne v. Union Electric Co.*, 953 F.2d 447, 451 (8th Cir. 1992) (holding that pension benefits are a "collateral source benefit"); *Dreyer v. Arco Chemical Co.*, 801 F.2d 651, 653 n.1 (3d Cir. 1986) (Social Security and pension benefits not deductible); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 138-39 (3d Cir. 1986) (unemployment benefits not deductible); *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (same) *but cf. Blum v Witco Chemical Corp.*, 829 F.2d 367, 374 (3d Cir. 1987) (pension benefits received as a result of subsequent employment considered in offsetting damages award); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1493 (10th Cir. 1989) (deductibility of unemployment compensation is within trial court's discretion); *Horn v. Duke Homes*, 755 F.2d 599, 607 n.12 (7th Cir. 1985) (same); *EEOC v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 592 (2d Cir. 1976) (same).

This instruction is designed to encompass a situation where the defendant asserts some independent post-discharge reason--such as a plant closing or sweeping reduction in force--why the plaintiff would have been terminated in any event before trial. *See, e.g., Cleverly v. Western Elec. Co.*, 450 F. Supp. 507 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979). Nevertheless, the trial court may give a separate instruction which submits this issue in more direct terms.

5.72B FIRST AMENDMENT RETALIATION - NOMINAL DAMAGES (42 U.S.C. § 1983)

If you find in favor of the plaintiff under Instruction ____,[1] but you do not find that the plaintiff's damages have monetary value, then you must return a verdict for the plaintiff in the nominal amount of One Dollar ($1.00).[2]

Notes on Use

1. Insert the number or title of the "essential elements" instruction here.

2. One Dollar ($1.00) arguably is the required amount in cases in which nominal damages are appropriate. Nominal damages are appropriate when the jury is unable to place a monetary value on the harm that the plaintiff suffered from the violation of his or her rights. *Cf. Cowans v. Wyrick*, 862 F.2d 697 (8th Cir. 1988) (in prisoner civil rights action, nominal damages are appropriate where the jury cannot place a monetary value on the harm suffered by the plaintiff); *Haley v. Wyrick*, 740 F.2d 12 (8th Cir. 1984).

Committee Comments

Most employment discrimination cases involve lost wages and benefits. Nevertheless, a nominal damage instruction should be given in appropriate cases, such as where a plaintiff claiming a discriminatory harassment did not sustain any loss of earnings. *Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541, 542-43, 548 (8th Cir. 1984).

An award of nominal damages can support a punitive damage award. *See Goodwin v. Circuit Court of St. Louis County*, 729 F.2d at 548.

If nominal damages are submitted, the verdict form must contain a line where the jury can make that finding.

5.72C FIRST AMENDMENT RETALIATION - PUNITIVE DAMAGES (42 U.S.C. § 1983)

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award punitive damages.

If you find in favor of the plaintiff and against the defendant [name],[1] [and if it has been proved[2] that the plaintiff's firing was motivated by evil motive or intent, or that the defendant acted with reckless indifference to the plaintiff's rights],[3] then in addition to any other damages to which you find the plaintiff entitled, you may, but are not required to, award the plaintiff an additional amount as punitive damages for the purposes of punishing the defendant for engaging in such misconduct and deterring the defendant and others from engaging in such misconduct in the future. The defendant acted with reckless indifference if:

> it has been proved that [insert the name(s) of the defendant or manager[4] who terminated[5] the plaintiff's employment] knew that the (termination) was in violation of the law prohibiting retaliation or acted with reckless disregard of that law.[6]

You should presume that a plaintiff has been made whole for [his, her, its] injuries by the damages awarded under Instruction ____.[7]

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. How reprehensible the defendant's conduct was.[8] In this regard, you may consider [whether the harm suffered by the plaintiff was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether the defendant's conduct that harmed the plaintiff also posed a risk of harm to others; whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed the plaintiff].[9]

2. How much harm the defendant's wrongful conduct caused the plaintiff [and could cause the plaintiff in the future].[10] [You may not consider harm to others in deciding the amount of punitive damages to award.][11]

3. What amount of punitive damages, in addition to the other damages already awarded, is needed, considering the defendant's financial condition, to punish the defendant for [his, her,

its] wrongful conduct toward the plaintiff and to deter the defendant and others from similar wrongful conduct in the future.

4. [The amount of fines and civil penalties applicable to similar conduct].[12]

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to the plaintiff.[13]

[You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.][14]

[You may not award punitive damages against the defendant[s] for conduct in other states.][15]

Notes on Use

1. Public entities, such as cities, cannot be sued for punitive damages under section 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). Consequently, the target of a punitive damage claim must be an individual defendant, sued in his or her individual capacity.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. *See supra* Model Instruction 5.22C n.2.

4. Use the name of the defendant, the manager who took the action, or other descriptive phrase such as "the manager who fired the plaintiff."

5. This language is designed for use in a discharge case. In a "failure to hire," "failure to promote," "demotion," or "constructive discharge" case, the language must be modified.

6. *See Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535, 536 (1999) (holding that "'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination" and that "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages"); *Canny v. Dr. Pepper/Seven-Up Bottling Group, Inc.*, 439 F.3d 894, 903 (8th Cir. 2006) (citing *Kolstad* and observing that an award of punitive damages may be inappropriate when the underlying theory of discrimination is novel or poorly recognized or "when the employer (1) is unaware federal law prohibits the relevant conduct, (2) believes the discriminatory conduct is lawful, or (3) reasonably believes there is a bona fide occupational qualification defense for the discriminatory conduct").

7. Fill in the number or title of the actual damages or nominal damages instruction here.

8. The word "reprehensible" is used in the same sense as it is used in common parlance. The Supreme Court, in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003), stated: "It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." In *Philip Morris USA v. Williams*, 549 U.S. 346, 355, 127 S. Ct. 1057, 1064-65 (2007), the Supreme Court held that, while harm to persons other than the plaintiff may be considered in determining reprehensibility, a jury may not punish for the harm caused to persons other than the plaintiff. The Court stated that procedures were necessary to assure "that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* at 355.

9. Any item not supported by the evidence, of course, should be excluded.

10. This sentence may be used if there is evidence of future harm to the plaintiff.

11. A paragraph instructing the jury that any punitive damages award should not include an amount for harm suffered by persons who are not parties to the case may be necessary if evidence concerning harm suffered by nonparties has been introduced. *See Philip Morris USA v. Williams*, 549 U.S. at 355, 127 S. Ct. at 1064-65; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-24 (2003); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004).

12. Insert this phrase only if evidence has been introduced, or the court has taken judicial notice, of fines and penalties for similar conduct. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996), noting "civil penalties authorized in comparable cases" as a guidepost to be considered. *See also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003).

13. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (stating that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" and observing that: "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to1 [citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996)] or, in this case, of 145 to 1.").

14. The bracketed language is available for use if punitive damages claims are submitted against more than one defendant.

15. If evidence has been introduced concerning conduct by the defendant that was legal in the state where it was committed, the jury must be told that they cannot award punitive damages against the defendant for such conduct. *See State Farm Mut. Auto. Inc. Co. v. Campbell*, 538 U.S. 408, 422 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572-73 (1996); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797-98 (8th Cir. 2004). This issue normally will not come up in cases under federal law. In any case in which evidence is admitted for some purposes but may not be considered by the jury in awarding punitive damages, the court should give an appropriate limiting instruction.

Employment Cases - First Amendment Retaliation

Committee Comments

Punitive damages are recoverable under 42 U.S.C. § 1983. *Smith v. Wade*, 461 U.S. 30 (1983).

This instruction attempts to incorporate the constitutionally relevant principles set forth by the Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459-62 (1993). In *State Farm*, 538 U.S. at 417, the Court observed: "We have admonished that '[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.'" (quoting *Honda Motor*, 512 U.S. at 432). *See Baker v. John Morrell & Co*., 266 F. Supp. 2d 909, 961 (N.D. Iowa 2003), *aff'd*, 382 F.3d 816 (8th Cir. 2004), and *In Re Exxon Valdez*, 296 F. Supp. 2d 1071, 1080 (D. Alaska 2004), for examples of punitive damages instructions in which the court attempted to incorporate constitutional standards.

The last paragraph is based on *State Farm*, 538 U.S. at 421, in which the Court held that: "A state cannot punish a defendant for conduct that may have been lawful where it occurred. . . . Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." The Court specifically mandated that: "A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm*, 538 U.S. at 422.

5.73 FIRST AMENDMENT RETALIATION - VERDICT FORM (42 U.S.C. § 1983)

VERDICT

Note: Complete this form by writing in the names required by your verdict.

On the [First Amendment retaliation][1] claim of the plaintiff [John Doe], as submitted in Instruction _____,[2] we find in favor of

_____

(Plaintiff John Doe) or (Defendant Sam Smith)

Note: Complete the following paragraphs only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberation on this claim.

We find plaintiff's (name) damages as defined in Instruction _____[3] to be:

$_____ (stating the amount or, if none, write the word "none")[4] (stating the amount, or if you find that the plaintiff's damages have no monetary value, set forth a nominal amount such as $1.00).[5]

We assess punitive damages against defendant (name), as submitted in Instruction _____,[6] as follows:

$_____ (stating the amount or, if none, write the word "none").

_____

Foreperson

Date: _____

Employment Cases - First Amendment Retaliation

Notes on Use

1. The bracketed language should be included when the plaintiff submits multiple claims to the jury.

2. The number or title of the "essential elements" instruction should be inserted here.

3. The number or title of the "actual damages" instruction should be inserted here.

4. Use this phrase if the jury has not been instructed on nominal damages.

5. Use this phrase if the jury is instructed on nominal damages.

6. The number or title of the "punitive damages" instruction should be inserted here.

5.73A FIRST AMENDMENT RETALIATION - SPECIAL INTERROGATORIES ON "BALANCING" ISSUES (42 U.S.C. § 1983)

SUPPLEMENTAL VERDICT FORM

As directed in Instruction No. _____,[1] we find as follows:

Question No. 1: Did the plaintiff's [memo to Principal Jones][2] cause, or could it have caused, disharmony or disruption in the workplace?

____ Yes ____ No
(Mark an "X" in the appropriate space)

Question No. 2: Did the plaintiff's [memo to Principal Jones] impair [(his) (her)] ability to perform [(his) (her)] duties?

____ Yes ____ No
(Mark an "X" in the appropriate space)

_____
Foreperson

Date: _____

Notes on Use

1. The number or title of the special interrogatory instruction should be inserted here. *See supra* Model Instruction 5.71A.

2. Describe the speech upon which the plaintiff bases his or her claim. This description should be identical to the phrase used in the special interrogatory instruction. *See supra* Model Instruction 5.71A.

Committee Comments

See supra Committee Comments to Instruction No. 5.71A. These special interrogatories are available for use when there are factual disputes underlying the determination of whether or not the plaintiff's speech was protected by the First Amendment. This supplemental verdict form should never be used alone; it always should accompany Model Instructions 5.71, 5.71A and 5.73, *supra*.

The questions listed in this model instruction are for illustration only; in every case, the list of relevant questions must be tailored to the particular situation. It also bears emphasis that the ultimate question of whether the plaintiff's speech was protected is for the Court and that no

single factor is dispositive. Accordingly, when this supplemental verdict form is used, the trial court should receive all of the jury's findings and it should postpone its entry of judgment while it fully evaluates the implications of those findings.

5.80 FAMILY AND MEDICAL LEAVE ACT (FMLA) (29 U.S.C. §§ 2601 - 2654)
Introduction

These instructions are for use with cases brought under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 - 2654. The purposes of the FMLA are to balance the demands on the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. 29 U.S.C. § 2601(b). The Act entitles eligible employees to take up to twelve workweeks of unpaid leave because of a serious health condition that makes the employee unable to perform the functions of his or her position; because of the birth of a son or daughter and to care for the newborn child; for placement with the employee of a son or daughter for adoption or foster care; to care for the employee's spouse, son, daughter, or parent who has a serious health condition; or because of a qualifying exigency of a covered military member. 29 U.S.C. § 2612; 29 C.F.R. § 825.112. Additionally, eligible employees are entitled to up to 26 workweeks of leave to care for a covered servicemember with a serious injury or illness. 29 U.S.C. § 2612; 29 C.F.R. § 825.112.

Employers Covered by the FMLA

A covered employer under the Act is one engaged in commerce or in an industry affecting commerce who employs fifty or more employees for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year. 29 U.S.C. § 2611(4)(A); 29 C.F.R. § 825.104(a); *Beal v. Rubbermaid Commercial Products, Inc*., 972 F. Supp. 1216, 1222 n.13 (S.D. Iowa 1997), *aff'd,* 149 F.3d 1186 (8th Cir. 1998). To be covered, the employee must work in an area where the employer employs fifty or more employees within a 75-mile radius. 29 U.S.C. § 2611(2)(B)(ii); 29 C.F.R. § 825.110(a)(3). The Eighth Circuit has also held that public officials in their individual capacities are "employers" under the FMLA. *Darby v. Bratch*, 287 F.3d 673, 680-81 (8th Cir. 2002). In addition, the Supreme Court has held that states are employers under the FMLA. *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

Employees Eligible for Leave

Not all employees are entitled to leave under FMLA. Before an employee can take leave to care for himself or herself, or a family member, the following eligibility requirements must be met: he or she must have been employed by the employer for at least twelve months and must have worked at least 1,250 hours during the previous twelve-month period. 29 U.S.C. § 2611(2)(A).

Amendments in 2008 to the FMLA provide two new leave entitlements: military caregiver leave and qualifying exigency leave. The Department of Labor issued revised implementing regulations effective January 16, 2009, allowing family members of wounded military personnel to take up to six months of unpaid leave to care for them during their rehabilitation process. 29 C.F.R. § 825 *et seq.*; *see* 73 FR 67934 *et seq*. Eligible employees who are family members of covered servicemembers will be able to take up to 26 workweeks of leave in a single twelve-month period to care for a servicemember who has a serious illness or injury that was incurred in the line of duty while on active duty. That twelve-month period begins when the employee starts using military caregiver leave. Employers will not have the option of

using the calendar-year method as they do for other types of FMLA leave. Entitlement to 26 weeks of military caregiver leave is provided for each servicemember and for each illness or injury, and covers more extended family members than those who may take FMLA leave for other reasons.

Qualifying exigency leave is intended to help the families of members of the National Guard and Reserves manage the members' affairs while they are on active duty or called to active duty status in support of a contingency operation. Family members may use all or part of the regular allotment of twelve weeks of FMLA leave. The final rule defines "any qualifying exigency" to include a number of broad categories of reasons and activities, including short-notice deployment, military events and related activities, child care and school activities, financial and legal arrangements, counseling, rest and recuperation, post-development activities, and any additional activities agreed to by the employer and the employee.

The Regulations should be consulted for appropriate guidance and jury instructions concerning the new military family leave provisions.

Family Members Contemplated by the FMLA

Employees are also eligible for leave when certain family members – his or her spouse, son, daughter, or parent – have serious health conditions. Spouse means a husband or wife as defined or recognized under state law where the employee resides, including common law spouses in states where common law marriages are recognized. 29 U.S.C. 2611(13); 29 C.F.R. § 825.122(a).

Parent means a biological parent of an employee or an individual who stood *in loco parentis* to an employee when the employee was a child. 29 U.S.C. § 2611(7). The term "parent" does not include grandparents or parents-in-law unless a grandparent or parent-in-law meets the *in loco parentis* definition. *Krohn v. Forsting*, 11 F. Supp. 2d 1082, 1091 (E.D. Mo. 1998).

Under the FMLA for the purposes of leave taken for birth or adoption or to care for a family member with a serious health condition, a son or daughter means a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is either under age 18, or who is age 18 or older but is incapable of self-care because of a mental or physical disability. 29 U.S.C. § 2611(12); 29 C.F.R. § 825.122(c). Persons with "*in loco parentis*" status under the FMLA include those who have day-to-day responsibility to care for and financially support a child. 29 C.F.R. § 825.122(c)(3).

"Incapable of self-care" means that the individual requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living. 29 C.F.R. § 825.122(c)(1).

"Activities of daily living" include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. *Id.* "Instrumental activities of daily living" include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. *Id.* "Physical

or mental disability" means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. 29 C.F.R. § 825.122(c)(2). These terms are defined in the same manner as they are under the Americans with Disabilities Act. *Id.*

For the purposes of FMLA qualifying exigency leave, "son or daughter on active duty or call to active duty status" mean "the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on active duty or call to active duty status, and who is of any age." 29 C.F.R. § 825.122(g).

For the purposes of leave to care for a covered servicemember with a serious injury or illness, "son or daughter of a covered servicemember" means the "servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the servicemember stood in loco parentis, and who is of any age." 29 C.F.R. § 825.122(h). A "parent of a covered servicemember" is "a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember." 29 C.F.R. § 825.122(i).

Leave for Birth, Adoption or Foster Care

The FMLA permits an employee to take leave for the birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement. 29 U.S.C. § 2612(a); 29 C.F.R. § 825.100.

An expectant mother may take leave for pregnancy, prenatal care, or for her own serious health condition following the birth of the child. 29 C.F.R. § 825.120(a)(4). Circumstances may require that the FMLA leave begin before the actual date of the birth of a child or the actual placement for adoption of a child. For example, an expectant mother may need to be absent from work for prenatal care, or her condition may make her unable to work. 29 C.F.R. § 825.120(a)(4). The expectant mother "is entitled to leave for incapacity even though she does not receive treatment from a health care provider during the absence and even if the absence does not last for more than three consecutive calendar days." 29 C.F.R. § 825.120(a)(5). An expectant father "is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for the spouse following the birth of a child if the spouse has a serious health condition." 29 C.F.R. § 825.120(a)(5).

Likewise, prospective adoptive or foster parents "may take leave before the actual placement or adoption of a child if absence from work is required for the placement for adoption or foster care to proceed." 29 C.F.R. § 825.121(a)(1).

"A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care or to

care for the child after placement, or to care for the employee's parent with a serious health condition." 29 C.F.R. § 825.120.

An employee's entitlement to leave for a birth or placement for adoption or foster care expires at the end of the twelve-month period beginning on the date of the birth or placement unless state law allows, or the employer permits, leave to be taken for a longer period. 29 C.F.R. § 825.120(a)(2). Any such FMLA leave must be concluded during this one-year period. *Id.* An employee is not required to designate whether the leave the employee is taking is FMLA leave or leave under state law. 29 C.F.R. § 825.701. If an employee's leave qualifies for FMLA and state-law leave, the leave used counts against the employee's entitlement under both laws. *Id.*

What Constitutes a "Serious Health Condition"?

One of the more frequently litigated aspects of the FMLA is the issue of what type of condition constitutes a "serious health condition" under the Act. The concept of "serious health condition" was meant to be construed broadly, so that the FMLA's provisions are interpreted to effect the Act's remedial purpose. *Stekloff v. St. John's Mercy Health Systems*, 218 F.3d 858, 862 (8th Cir. 2000). The phrase is defined in the regulations as an illness, injury, impairment or physical or mental condition that involves inpatient care, a period of incapacity combined with treatment by a health care provider, pregnancy or prenatal care, chronic conditions, long-term incapacitating conditions, and conditions requiring multiple treatments. 29 C.F.R. § 825.113(a); 29 C.F.R. § 825.115.

Specifically, inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity (inability to work, attend school or perform other regular daily activities), or any subsequent treatment in connection with the inpatient care. 29 C.F.R. § 825.114(a)(1).

Incapacity plus treatment means a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three full consecutive days, including any subsequent treatment or period of incapacity relating to the same condition, that <u>also</u> involves: 1) treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health services (for example, a physical therapist) under orders of, or on referral by, a health care provider; the two visits must occur within thirty days of the start of the period of incapacity, 29 C.F.R. § 825.115(a)(1); or 2) treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider, with the first visit to the health care provider taking place within seven days of the incapacity. 29 C.F.R. § 825.115(a)(2) and (3). In some circumstances, the regulatory definition of incapacity offers limited guidance. *See, e.g., Caldwell v. Holland of Texas*, 208 F.3d 671, 675 (8th Cir. 2000) (in situation where three-year-old child did not work or attend school, the FMLA regulations offered insufficient guidance for determining whether child was incapacitated and fact finder must determine whether the child's illness demonstrably affected his or her normal activity).

Note that under the FMLA, a demonstration that an employee is unable to work in his or her current job due to a serious health condition is enough to show the employee is incapacitated

even if that job is the only one the employee is unable to perform. *Stekloff*, 218 F.3d at 861. This standard is less stringent than under the ADA in which a plaintiff must show that he or she is unable to work in a broad range of jobs to show that he or she is unable to perform the major life activity of working. *Id.*

Pregnancy or prenatal care includes any period of incapacity due to the pregnancy or prenatal care, such as time off from work for doctors' visits. 29 C.F.R. § 825.115(b).

A chronic health condition means a condition which requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider, which continues over an extended period of time (including recurring episodes of a single underlying condition), and may cause episodes of incapacity (inability to work, attend school or perform other regular daily activities) rather than continuing incapacity. 29 C.F.R. § 825.115(c). To qualify as a chronic serious health condition, the employee must make at least two visits to a health care provider per year. 29 C.F.R. § 825.115(c)(1).

Long-term incapacitating conditions are those for which treatment may not be effective, but require continuing supervision of a health care provider, even though the patient may not be receiving active treatment. 29 C.F.R. § 825.115(d).

Conditions requiring multiple treatments include any period of absence to receive multiple treatments (including any period of recovery from the treatments) by a health care provider, or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive calendar days in the absence of medical intervention or treatment. 29 C.F.R. § 825.115(e).

The FMLA regulations provide some guidance concerning what is and is not a serious health condition. For example, the following generally do not fall within the definition of a serious health condition: routine physical, eye or dental examinations; treatments for acne or plastic surgery; common ailments such as a cold or the flu, ear aches, upset stomach, minor ulcers, headaches (other than migraines); and treatment for routine dental or orthodontic problems or periodontal disease. 29 C.F.R. § 825.113(c)(d). While the above conditions are not generally considered "serious," the Eighth Circuit has held that some conditions, such as upset stomach or a minor ulcer, could still be "serious health conditions" if they meet the regulatory criteria, for example, an incapacity of more than three consecutive calendar days that also involved qualifying treatment. *Thorson v. Gemini, Inc.*, 205 F.3d 370, 379 (8th Cir.), *aff'd*, 205 F.3d 370 (8th Cir. 2000).

In addition, the regulations provide guidance regarding what conditions commonly are considered serious health conditions. For example, chronic conditions could include asthma, diabetes or epilepsy; long-term incapacitating conditions could include Alzheimer's, a severe stroke or the terminal stages of a disease; and conditions requiring multiple treatments could include cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis). 29 C.F.R. § 825.115.

Courts in the Eighth Circuit have provided additional guidance regarding what constitutes a serious health condition. In *Beal v. Rubbermaid Commercial Products, Inc.*, 972 F. Supp. 1216 (S.D. Iowa 1997), *aff'd*, 149 F.3d 1186 (8th Cir. 1998), the court analyzed several conditions against the regulatory definition. The court found that a minor back ailment, eczema, and non-incapacitating bronchitis were not serious health conditions under the FMLA. *Id.* at 1223-25. The court also held that an employee was not entitled to FMLA leave subsequent to her son's death noting "[l]eave is not meant to be used for bereavement because a deceased person has no basic medical, nutritional, or psychological needs which need to be cared for." *Id.* at 1216.

In addition, the Eighth Circuit has held that examinations and evaluations given to an employee's child to determine whether the child had been sexually molested did not amount to treatment for a serious health condition covered by the FMLA. *Martyszenko v. Safeway, Inc.*, 120 F.3d 120, 123-24 (8th Cir. 1997). The alleged molestation did not create a mental condition that hindered the child's ability to participate in any activity at all and did not restrict any of the child's daily activities. *Id.*

The regulations also provide that the phrase "continuing treatment" as used in the definition of serious health condition, includes a course of prescription medication and therapy, but not over-the-counter medications, bed-rest or exercise. 29 C.F.R. § 825.113(c).

The Regulations also provide that the employee must obtain a medical certification regarding a serious health care condition. 29 C.F.R. § 825.304. If the employer views one medical certification form as incomplete or insufficient, the new Regulations require the employer to notify the employee, in writing, and give the employee seven calendar days to provide additional information. 29 C.F.R. § 825.304(c).

Separate Causes of Action Under the FMLA for Interference and Retaliation

Courts have recognized two distinct causes of action under the FMLA. First, a plaintiff may pursue recovery under an "interference" theory. This claim arises under 29 U.S.C. § 2615(a)(1), which makes it unlawful for an employer "to interfere with, restrain, or deny" an employee's rights under the FMLA. Under an interference claim, it is the plaintiff's burden to demonstrate that she was entitled to a benefit under the FMLA, but was denied that entitlement. *Phillips v. Mathews*, 547 F.3d 905, 913-14 (8th Cir. 2008). The FMLA entitles eligible employees to reinstatement at the end of their FMLA leave to the position held before taking leave or an equivalent position. If the plaintiff meets this burden, then it is the defendant's burden to demonstrate that she would have been denied reinstatement even if she had not taken FMLA leave.

The second type of recovery under the FMLA is the "retaliation" theory. This claim arises under 29 U.S.C. § 2615(a)(2), which makes it unlawful for an employer to discriminate against an employee who has taken FMLA leave. Retaliation claims are analyzed under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To establish a prima facie case of retaliation under the FMLA, a plaintiff must show (1) she engaged in a statutorily protected activity; (2) she suffered an adverse employment action; and (3) a

causal connection exists between the adverse action and the plaintiff's exercise of her FMLA rights. After establishing a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its adverse employment action. If the employer offers a legitimate, nondiscriminatory reason, the burden is shifted back to the plaintiff to establish that the employer's reasons are pretextual. (Most citations omitted.)

Notice of the Need for Leave

In order to be entitled to leave under the FMLA, the employee must give timely notice of the need for leave and provide the employer sufficient information that leave is for a qualifying reason under the FMLA. *Phillips v. Matthews*, 547 F.3d 905, 909 (8th Cir. 2008); *Scobey v. Nucor Steel-Arkansas*, 580 F.3d 781, 785-86 (8th Cir. 2009). If the leave is foreseeable, the employee must provide at least thirty days advance notice before the leave is to begin. 29 C.F.R. § 825.302(a). If the leave is unforeseeable then the employee is to provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. 29 C.F.R. § 825.303(a). As soon as practicable means as soon as possible and practical, taking into account the circumstances of the individual case, which in most cases would be that same day or the next business day. 29 C.F.R. § 825.302(b). Further, an employer may require that the employee comply with the employer's notice requirements absent unusual circumstances. 29 C.F.R. § 825.302(d).

Additionally the, employee must provide sufficient information about the reason for leave for the employer to reasonably determine the FMLA may apply to the leave request. 29 C.F.R. § 825.302(c) and 29 C.F.R. § 825.303(b); *Woods v. Daimler-Chrysler Corp.* 409 F.3d 984, 990 (8th Cir. 2005). "The employer's duties arise 'when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave.'" *Phillips,* 547 F.3d at 909 (quoting *Browning v. Liberty Mutual Ins Co.*, 178 F.3d 1943 (8th Cir. 1999)). Thus, employees have an affirmative duty to timely advise the employer of the need and reason for leave. *Scobey*, 580 F.3d at 785-86.

The Relationship Between the Fair Labor Standards Act (FLSA), Civil Rights Legislation, and the FMLA

Although earlier cases suggested the FMLA was more akin to the FLSA than to Civil Rights legislation, *see, e.g., Morris v. VCW, Inc.*, 1996 WL 740544 (W.D. Mo. 1996), the Supreme Court has left no doubt that the FMLA is an anti-discrimination statute. *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 728-29 (2003) (holding the FMLA aims to protect the right to be free from gender-based discrimination in the workplace and such a statutory scheme is subject to heightened scrutiny). However, the FLSA can provide guidance for the interpretation of FMLA terms such as using FLSA "hours of service" to calculate FMLA eligibility for leave and determination of whether a supervisor is an "employer" for FMLA purposes. *See Morris* at *2 and cases cited therein.

Employment Cases - Family and Medical Leave Act (FMLA)

In retaliation cases under the FMLA, courts frequently borrow the framework and method of analysis in civil rights cases. *See, e.g.*, *Phillips v. Mathews*, 547 F.3d 905, 913-14 (8th Cir. 2008) (FMLA makes it unlawful for an employer to discriminate against any individual for opposing any practice made unlawful by the Act; this opposition clause is derived from Title VII of the Civil Rights Act of 1964).

Nothing in the FMLA modifies or affects any federal or state law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age or disability (*e.g.*, Title VII, the Pregnancy Discrimination Act, the Rehabilitation Act, the ADA, etc.). 29 U.S.C. § 2651(a)(b); 29 C.F.R. § 825.702(a).

5.81A FMLA - WRONGFUL TERMINATION - ELEMENTS (Employee with a Serious Health Condition)

Your verdict must be for the plaintiff [and against defendant _____][1] if all of the following elements have been proved[2]:

[*First*, the plaintiff was eligible for leave[3]; and]

First, the plaintiff had a serious health condition (as defined in Instruction _____)[4]; and

Second, the plaintiff was [absent from work][5] because of that serious health condition; and

[*Third*, the plaintiff gave the defendant timely notice (as defined in Instruction _____)[6] of [(his) (her)] need to be [absent from work][5]][7]; and

[*Fourth*, as soon as practicable (as defined in Instruction _____)[8], the plaintiff gave the defendant sufficient information so that the defendant knew or should have known the absence was for a serious health condition][9]; and

Fifth, the defendant [describe employment action taken, e.g., discharged][10] the plaintiff; and

Sixth, the plaintiff's [absence from work][5] was a [(motivating) (determining)][11] factor in the defendant's decision to [describe employment action taken, e.g., discharge][10] the plaintiff.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction _____)][12].

[You may find that the plaintiff's [absence from work] was a [(motivating) (determining)] factor in the defendant's (decision)[13] if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.][14]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See supra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

4. Insert the number of the Instruction defining "serious health condition."

5. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee whose leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

6. Reference to the instruction relating to the definition of "Timely Notice" should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a) or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

7. This element is bracketed because "timely notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

8. Insert the number of the Instruction defining "as soon as practicable."

9. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant "knew" or "should have known" that the requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

10. Insert language that corresponds to the facts of the case. In addition to protecting employees from retaliatory termination, the FMLA prohibits employers from interfering with or retaliating against employees who attempt to exercise rights under the FMLA. *See Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 977 (8th Cir. 2005) ("The FMLA makes it 'unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under' the FMLA, 29 U.S.C. § 2615(a)(1). A violation of this provision creates what is commonly known as the interference theory of recovery. 29 U.S.C. § 2617. . . . The FMLA also makes it 'unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by' the FMLA. 29 U.S.C. § 2615(a)(2). A violation of this provision creates what is commonly known as the discrimination theory of recovery. 29 U.S.C. § 2617.")

11. See the Introduction for a discussion of whether the term "determining" factor or "motivating" factor should be used.

12. This language should be used when the defendant is submitting an affirmative defense.

13. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

14. This sentence may be added, if appropriate. *See* Model Instruction 5.95, *infra*, and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

The FMLA prohibits an employer from terminating an employee because the employee exercised rights or attempted to exercise rights under the FMLA. An employee who contends he or she was terminated because of FMLA leave, or a request to take FMLA leave, must show that the employer's action was motivated by discrimination because of the leave or request for leave. *Marks v. The School Dist. of Kansas City, Missouri*, 941 F. Supp. 886, 892 (W.D. Mo. 1996) (quoting *Day v. Excel Corp.*, 1996 WL 294341 (D. Kan. 1996)).

If the plaintiff is alleging the defendant's stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.95, *infra*, may be used.

5.81B FMLA - WRONGFUL TERMINATION - ELEMENTS (Employee Needed to Care for Spouse, Parent, Son or Daughter with a Serious Health Condition)[1]

Your verdict must be for the plaintiff [and against defendant _____][2] if all of the following elements have been proved[3]:

[*First*, the plaintiff was eligible for leave[4]; and]

First, the plaintiff's [identify family member] had a serious health condition (as defined in Instruction _____)[5]; and

Second, the plaintiff was needed to care for [identify family member]; and

Third, the plaintiff was [absent from work][6] to care for [identify family member]; and

[*Fourth*, the plaintiff gave the defendant timely notice (as defined in Instruction ____)[7] of [(his) (her)] need to be [absent from work][6]][8] and

[*Fifth*, as soon as practicable (as defined in Instruction _____)[9], the plaintiff gave the defendant sufficient information so that the defendant knew or should have known the absence was for a serious health condition of [identify family member]] [10]; and

Sixth, the defendant [describe employment action taken, e.g., discharged][11] the plaintiff; and

Seventh, the plaintiff's [absence from work][6] was a [(motivating) (determining)][12] factor in the defendant's decision to [describe employment action taken, e.g., discharge] [11] the plaintiff.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction _____)][13].

[You may find that the plaintiff's [absence from work] was a [(motivating) (determining)] factor in the defendant's (decision)[14] if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.][15]

Notes on Use

1. This Instruction is for use in cases in which the employee's family member had a serious health condition. Model Instruction 5.81C, *infra*, should be used for cases in which the employee needed leave because of a birth, adoption or foster care.

2. Use this phrase if there are multiple defendants.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See supra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

5. Insert the number of the Instruction defining "serious health condition."

6. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee whose leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

7. Reference to the instruction relating to the definition of "Timely Notice" should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a) or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

8. This element is bracketed because "timely notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

9. Insert the number of the Instruction defining "as soon as practicable."

10. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant "knew" or "should have known" that the requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

11. Insert the language that corresponds to the facts of the case. In addition to protecting employees from retaliatory termination, the FMLA prohibits employers from interfering with or retaliating against employees who attempt to exercise rights under the FMLA. *See Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 977 (8th Cir. 2005) ("The FMLA makes it 'unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under' the FMLA, 29 U.S.C. § 2615(a)(1). A violation of this provision creates what is commonly known as the interference theory of recovery. 29 U.S.C. § 2617. . . . The FMLA also makes it 'unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by' the FMLA. 29 U.S.C. § 2615(a)(2). A violation of this provision creates what is commonly known as the discrimination theory of recovery. 29 U.S.C. § 2617.")

12. See the Introduction for a discussion of whether the term "determining" factor or "motivating" factor should be used.

13. This language should be used when the defendant is submitting an affirmative defense.

14. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

15. This sentence may be added, if appropriate. *See* Model Instruction 5.95, *infra*, and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

The FMLA entitles an eligible employee to take up to 12 workweeks of leave if the employee is needed to care for the employee's spouse, son, daughter or parent with a serious health condition. The FMLA prohibits an employer from terminating an employee because the employee exercised rights or attempted to exercise rights under the

FMLA. An employee who contends he or she was terminated because of FMLA leave, or a request to take FMLA leave, must show that the employer's action was motivated by discrimination because of the leave or request for leave. *Marks v. The School Dist. of Kansas City, Missouri*, 941 F. Supp. 886, 892 (W.D. Mo. 1996) (quoting *Day v. Excel Corp.*, 1996 WL 294341 (D. Kan. 1996)).

If the plaintiff is alleging the defendant's stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.95, *infra*, may be used.

5.81C FMLA - WRONGFUL TERMINATION - ELEMENTS (Employee Leave for Birth, Adoption or Foster Care)[1]

Your verdict must be for the plaintiff [and against defendant _____][2] if all of the following elements have been proved[3]:

[*First*, the plaintiff was eligible for leave[4]; and]

First, the plaintiff was [absent from work][5] because of [the birth of a son or daughter, or for placement with the plaintiff of a son or daughter for adoption or foster care][6]; and

[*Second*, the plaintiff gave the defendant timely notice (as defined in Instruction _____)[7] of [(his) (her)] need to be [absent from work][5]][8] and

[*Third*, as soon as practicable (as defined in Instruction _____)[9], the plaintiff gave the defendant sufficient information so that the defendant knew or should have known the absence was for [the birth of a son or daughter, or for placement with the plaintiff of a son or daughter for adoption or foster care]] [10] and

Fourth, the defendant [describe employment action taken, e.g., discharged][11] the plaintiff; and

Fifth, the plaintiff's [absence from work][5] was a [(motivating) (determining)][12] factor in the defendant's decision to [describe employment action taken, e.g., discharge][10] the plaintiff.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction ____)][13].

[You may find that the plaintiff's [absence from work] was a [(motivating) (determining)] factor in the defendant's (decision)[14] if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.][15]

Notes on Use

1. This Instruction is for use in cases in which the employee needed leave because of a birth, adoption or foster care. Model Instruction 5.81B, *supra*, should be used for cases in which the employee's family member had a serious health condition. This Instruction differs from Model Instruction 5.81B, *supra*, in that it does not include an element requiring the plaintiff to show that he or she was "needed to care for" the newborn, adopted child or foster child. One of the purposes of the FMLA is to provide time for early parent-child bonding. 1993 U.S. Code Cong. and Admin. News 3, 11; 139 Cong. Rec. H 319, 384, 387, 396; *Kelley Co. v. Marquardt*, 172 Wis. 2d 234, 493 N.W.2d 68, 75 (Wis. 1992).

2. Use this phrase if there are multiple defendants.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See supra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

5. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee whose leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

6. Insert the language that corresponds to the facts of the case.

7. Reference to the instruction relating to the definition of "Timely Notice" should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a) or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

8. This element is bracketed because "timely notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

9. Insert the number of the Instruction defining "as soon as practicable."

10. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant "knew" or "should have known" that the requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

11. Insert the language that corresponds to the facts of the case. In addition to protecting employees from retaliatory termination, the FMLA prohibits employers from interfering with or retaliating against employees who attempt to exercise rights under the FMLA. *See Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 977 (8th Cir. 2005) ("The FMLA makes it 'unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under' the FMLA, 29 U.S.C. § 2615(a)(1). A violation of this provision creates what is commonly known as the interference theory of recovery. 29 U.S.C. § 2617. . . . The FMLA also makes it 'unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by' the FMLA. 29 U.S.C. § 2615(a)(2). A violation of this provision creates what is commonly known as the discrimination theory of recovery. 29 U.S.C. § 2617.")

12. See the Introduction for a discussion of whether the term "determining" factor or "motivating" factor should be used.

13. This language should be used when the defendant is submitting an affirmative defense.

14. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

15. This sentence may be added, if appropriate. *See* Model Instruction 5.95, *infra*, and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

Committee Comments

The FMLA entitles an eligible employee to take up to 12 workweeks of leave for the birth of a son or daughter, or for placement with the employee of a son or daughter for adoption or foster care. 29 U.S.C. § 2612(a)(1)(A), (B); 29 C.F.R. § 825.112(a)(1), (2). The FMLA prohibits an employer from terminating an employee because the employee exercised rights or attempted to exercise rights under the FMLA. An employee who contends that he or she was terminated because of FMLA leave, or a request to take FMLA leave, must show that the employer's action was motivated by discrimination because of the leave or request for leave. *Marks v. The School Dist. of Kansas City, Missouri*, 941 F. Supp. 886, 892 (W.D. Mo. 1996) (quoting *Day v. Excel Corp.*, 1996 WL 294341 (D. Kan. 1996)).

If the plaintiff is alleging the defendant's stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.95, *infra*, may be used.

5.81D FMLA - WRONGFUL TERMINATION - ELEMENTS (Qualifying Exigency Leave Related to Covered Military Member)

Your verdict must be for the plaintiff [and against defendant _____][1] if all of the following elements have been proved[2]:

[*First*, the plaintiff was eligible for leave[3]; and]

Second, a qualifying exigency (as defined in Instruction _____)[4] existed; and

Third, such qualifying exigency arose out of the fact that the plaintiff's [spouse, son, daughter, or parent] was on active duty or call to active duty status in support of a contingency operation[5] (as defined in Instruction _____); and

Fourth, such [spouse, son, daughter, or parent] was a member of the [Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve, or Coast Guard Reserve or was retired member of the Regular Armed Forces or Reserve][6]; and

Fifth, the plaintiff was [absent from work][7] because of such qualifying exigency; and

[*Sixth*, the plaintiff gave the defendant timely notice (as defined in Instruction ____)[8] of [(his) (her)] need to be [absent from work] [7]][9] and

[*Seventh,* as soon as practicable (as defined in Instruction ____)[10], the plaintiff gave sufficient information so that the defendant knew or should have known that the absence was for a qualifying exigency arising out of the fact that the plaintiff's [spouse, son, daughter, or parent] was on active duty or call to active duty status in support of a contingency operation;] [11] and

Eighth, the defendant [describe employment action taken, e.g., discharged][12] the plaintiff; and

Ninth, the plaintiff's [absence from work][7] was a [(motivating) (determining)][13] factor in the defendant's decision to [describe employment action taken, e.g., discharge] [12] the plaintiff.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction _____)][14].

[You may find that the plaintiff's [absence from work] was a [(motivating) (determining)] factor in the defendant's (decision)[15] if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.][16]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. See supra "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

4. Insert the number of the Instruction defining "qualifying exigency."

5. "The active duty orders of a covered military member will generally specify if the servicemember is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation."

6. Qualifying Exigency leave is not available where the family member is on active duty or call to active duty status in support of a contingency operation as a member of the Regular Armed Forces.

7. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee whose leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

8. Reference to the instruction relating to the definition of "Timely Notice" should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a) or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

9. This element is bracketed because "timely notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

10. Insert the number of the Instruction defining "as soon as practicable."

11. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant "knew" or "should have known" that the requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

12. Insert the language that corresponds to the facts of the case. In addition to protecting employees from retaliatory termination, the FMLA prohibits employers from interfering with or retaliating against employees who attempt to exercise rights under the FMLA. See *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 977 (8th Cir. 2005) ("The FMLA makes it 'unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under' the FMLA, 29 U.S.C. § 2615(a)(1). A violation of this provision creates what is commonly known as the interference theory of recovery. 29 U.S.C. § 2617. . . . The FMLA also makes it 'unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by' the FMLA. 29 U.S.C. § 2615(a)(2). A violation of this provision creates what is commonly known as the discrimination theory of recovery. 29 U.S.C. § 2617.")

13. See the Introduction for a discussion of whether the term "determining" factor or "motivating" factor should be used.

14. This language should be used when the defendant is submitting an affirmative defense.

15. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

16. This sentence may be added, if appropriate. See Model Instruction 5.95, infra, and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

5.81E FMLA - WRONGFUL TERMINATION - ELEMENTS (Employee Needed to Care for Covered Servicemember with a Serious Injury or Illness)

Your verdict must be for the plaintiff [and against defendant _____][1] if all of the following elements have been proved[2]:

[*First*, the plaintiff was eligible for leave[3]; and]

Second, the plaintiff [(is)(was)] the [spouse, son, daughter, parent, or next of kin (as defined in Instruction ___)[4]] of a covered servicemember (as defined in Instruction ___)[5]; and

Third, such covered servicemember [(has)(had)] a serious injury or illness (as defined in Instruction ___)[6]; and

Fourth, the employee was needed to care for such covered servicemember (as defined in Instruction ___)[7]; and

Fifth, the plaintiff was [absent from work][8] to care for such covered servicemember; and

[*Sixth*, the plaintiff gave the defendant timely notice (as defined in Instruction _____)[9] of [(his) (her)] need to be [absent from work] [8]][10] and

[*Seventh*, as soon as practicable (as defined in Instruction ____)[11], the plaintiff gave sufficient information so that the defendant knew or should have known that the absence was for the need to care for a covered servicemember]; [12] and

Eighth, the defendant [describe employment action taken, e.g., discharged][13] the plaintiff; and

Ninth, the plaintiff's [absence from work] [8] was a [(motivating) (determining)][14] factor in the defendant's decision to [describe employment action taken, e.g., discharge] [10] the plaintiff.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction _____)][15].

[You may find that the plaintiff's [absence from work] was a [(motivating) (determining)] factor in the defendant's (decision)[16] if it has been proved that the defendant's stated reason(s) for its (decision) [(is) (are)] a pretext to hide discrimination.][17]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. See supra "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

4. Insert the number of the Instruction defining "next of kin" for a covered military member.

5. Insert the number of the Instruction defining "covered servicemember" for leave to care for a covered servicemember with a serious injury or illness.

6. Insert the number of the Instruction defining a "serious injury or illness" of a covered servicemember.

7. Insert the number of the Instruction defining "needed to care for."

8. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee whose leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

9. Reference to the instruction relating to the definition of "Timely Notice" should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a) or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

10. This element is bracketed because "timely notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

11. Insert the number of the Instruction defining "as soon as practicable."

12. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant "knew" or "should have known" that the requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

13. Insert the language that corresponds to the facts of the case. In addition to protecting employees from retaliatory termination, the FMLA prohibits employers from interfering with or retaliating against employees who attempt to exercise rights under the FMLA. See *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 977 (8th Cir. 2005) ("The FMLA makes it 'unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under' the FMLA, 29 U.S.C. § 2615(a)(1). A violation of this provision creates what is commonly known as the interference theory of recovery. 29 U.S.C. § 2617. . . . The FMLA also makes it 'unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by' the FMLA. 29 U.S.C. § 2615(a)(2). A violation of this provision creates what is commonly known as the discrimination theory of recovery. 29 U.S.C. § 2617.")

14. See the Introduction for a discussion of whether the term "determining" factor or "motivating" factor should be used.

15. This language should be used when the defendant is submitting an affirmative defense.

16. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--would be more appropriate.

17. This sentence may be added, if appropriate. See Model Instruction 5.95, infra, and *Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be

reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it."

5.81F FMLA - FAILURE TO REINSTATE - ELEMENTS (Employee with a Serious Health Condition)

Your verdict must be for the plaintiff [and against defendant _____][1] if all of the following elements have been proved[2]:

[*First*, the plaintiff was eligible for leave[3]; and]

First, the plaintiff had a serious health condition (as defined in Instruction _____)[4]; and

[*Second*, the plaintiff gave the defendant timely notice (as defined in Instruction _____)[5] of [(his) (her)] need to be [absent from work][6]][7] ;and

[*Third,* as soon as practicable (as defined in Instruction ____)[8], the plaintiff gave sufficient information so that the defendant knew or should have known that the absence was for a serious health condition] [9]; and

Fourth, the plaintiff was absent from work because of that serious health condition; and

Fifth, the plaintiff received treatment and was able to return to work and perform the functions of [(his) (her)] job at the expiration of the leave period[10]; and

Sixth, the defendant refused to reinstate the plaintiff to the same or an equivalent position (as defined in Instruction _____)[11] held by the plaintiff when the absence began.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction ____)][12].

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See supra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

4. Insert the number of the Instruction defining "serious health condition."

5. Reference to the instruction relating to the definition of "Timely Notice" should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a) or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

6. Insert language with respect to the nature of the leave that corresponds to the facts of the case.

7. This element is bracketed because "timely notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

8. Insert the number of the Instruction defining "as soon as practicable."

9. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant "knew" or "should have known" that the requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

10. Define the "leave period" or use the date of the expiration of the leave period.

11. Insert the number of the Instruction defining "equivalent position."

12. This language should be used when the defendant is submitting an affirmative defense.

Committee Comments

The FMLA entitles an employee on leave to be reinstated to the same or an equivalent position upon return from leave. 29 U.S.C. § 2614; 29 C.F.R. § 825.214; *McGraw v. Sears, Roebuck & Co*., 21 F. Supp. 2d 1017 (D. Minn. 1998).

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period. 29 C.F.R. § 825.216(a). For example, if the employer can prove that

during the FMLA leave the employee would have been laid off and not entitled to job restoration regardless of that leave, the employee cannot prevail. *Id.* *See infra* Model Instruction 5.84A. *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 978 (8th Cir. 2005).

If the plaintiff is alleging the defendant's stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.95, *infra*, may be used.

Employment Cases - Family and Medical Leave Act (FMLA)

5.81G FMLA - FAILURE TO REINSTATE – ELEMENTS
(Employee Needed to Care for a Spouse, Son or Daughter with a Serious Health Condition)[1]

Your verdict must be for the plaintiff [and against defendant _____)[2] if all of the following elements have been proved[3]:

[*First*, the plaintiff was eligible for leave[4]; and]

First, the plaintiff's [identify family member] had a serious health condition (as defined in Instruction _____)[5]; and

Second, the plaintiff was needed to care for (as defined in Instruction _____)[6] [(his) (her)] [identify family member] because of that serious health condition; and

[*Third*, the plaintiff gave the defendant timely notice (as defined in Instruction _____)[7] of [(his) (her)] need to be [absent from work][8]][9] ; and

[*Fourth*, as soon as practicable (as defined in Instruction _____)[10], the plaintiff gave sufficient information so that the defendant knew or should have known that the absence was for a serious health condition of [identify family member]] [11]; and

Fifth, the plaintiff was absent from work because [(he) (she)] was caring for [(his) (her)] [identify family member] with the serious health condition; and

Sixth, the plaintiff was able to return to [(his) (her)] job at the expiration of the leave period; and

Seventh, the defendant refused to reinstate the plaintiff to the same or an equivalent position (as defined by Instruction _____)[12] held by the plaintiff when the absence began.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction _____)][13].

Notes on Use

1. This Instruction is for use in cases in which the employee's family member had a serious health condition. Model Instruction 5.81F, *infra*, should be used for cases in which the employee needed leave because of a birth, adoption or foster care.

2. Use this phrase if there are multiple defendants.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See supra* "Employees Eligible for Leave" in section 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

5. Insert the number of the Instruction defining "serious health condition."

6. Insert the number of the Instruction defining "needed to care for."

7. Reference to the instruction relating to the definition of "Timely Notice" should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a) or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

8. Insert language with respect to the nature of the leave that corresponds to the facts of the case.

9. This element is bracketed because "timely notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

10. Insert the number of the Instruction defining "as soon as practicable."

11. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant "knew" or "should have known" that the requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

12. Insert the number of the Instruction defining "equivalent position."

13. This language should be used when the defendant is submitting an affirmative defense.

Committee Comments

The FMLA entitles an eligible employee to take up to 12 workweeks of leave if the employee is needed to care for the employee's spouse, son, daughter or parent with a serious health condition. The FMLA also entitles an employee on leave to be reinstated to the same or an equivalent position upon return from leave. 29 U.S.C. § 2614; 29 C.F.R. § 825.214; *McGraw v. Sears, Roebuck & Co*., 21 F. Supp. 2d 1017 (D. Minn. 1998).

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period. 29 C.F.R. § 825.216(a). For example, if the employer can prove that during the FMLA leave the employee would have been laid off and not entitled to job restoration regardless of that leave, the employee cannot prevail. *Id. See infra* Model Instruction 5.84A. *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 978 (8th Cir. 2005).

If the plaintiff is alleging the defendant's stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.95, *infra*, may be used.

5.81H FMLA - FAILURE TO REINSTATE – ELEMENTS (Employee Leave for Birth, Adoption or Foster Care)[1]

Your verdict must be for the plaintiff [and against defendant_____)[2] if all of the following elements have been proved[3]:

[*First*, the plaintiff was eligible for leave[4]; and]

First, the plaintiff was absent from work because of [the birth of a son or daughter, or for placement with the plaintiff of a son or daughter for adoption or foster care][5]; and

[*Second*, the plaintiff gave the defendant timely notice (as defined in Instruction _____)[6] of [(his) (her)] need to be [absent from work][7]][8] ; and

[*Third*, as soon as practicable (as defined in Instruction ____)[9], the plaintiff gave sufficient information so that the defendant knew or should have known that the absence was for [the birth of a son or daughter, or for placement with the plaintiff of a son or daughter for adoption or foster care]] [10] ; and

Fourth, the plaintiff was able to return to [(his) (her)] job at the expiration of the leave period[11]; and

Fifth, the defendant refused to reinstate the plaintiff to the same or an equivalent position (as defined by Instruction _____)[12] held by the plaintiff when the absence began.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction _____)][13].

Notes on Use

1. This Instruction is for use in cases in which the employee needed leave because of a birth, adoption or foster care. Model Instruction 5.81E, *supra*, should be used for cases in which the employee's family member had a serious health condition. This Instruction differs from Instruction 5.81E, *supra*, in that it does not include an element requiring the plaintiff to show that he or she was "needed to care for" the newborn, adopted child or foster child. One of the purposes of the FMLA is to provide time for early parent-child bonding. 1993 U.S. Code Cong. and Admin. News 3, 11; 139 Cong. Rec. H 319, 384, 387, 396; *Kelley Co. v. Marquardt*, 172 Wis. 2d 234, 493 N.W.2d 68, 75 (Wis. 1992).

2. Use this phrase if there are multiple defendants.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. *See supra* "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

5. Insert the language that corresponds to the facts of the case.

6. Reference to the instruction relating to the definition of "Timely Notice" should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a) or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

7. Insert language with respect to the nature of the leave that corresponds to the facts of the case.

8. This element is bracketed because "timely notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

9. Insert the number of the Instruction defining "as soon as practicable."

10. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant "knew" or "should have known" that the requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

11. Define the "leave period" or use the actual date of the expiration of the leave period.

12. Insert the number of the Instruction defining "equivalent position."

13. This language should be used when the defendant is submitting an affirmative defense.

Committee Comments

The FMLA entitles an eligible employee to take up to 12 workweeks of leave for the birth of a son or daughter, or for placement with the employee of a son or daughter for adoption or foster care. The FMLA also entitles an employee on leave to be reinstated to the same or an equivalent position upon return from leave. 29 U.S.C. § 2614; 29 C.F.R. § 825.214; *McGraw v. Sears, Roebuck & Co*., 21 F. Supp. 2d 1017 (D. Minn. 1998).

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA period. 29 C.F.R. § 825.216(a). For example, if the employer can prove that during the FMLA leave the employee would have been laid off and not entitled to job restoration regardless of that leave, the employee cannot prevail. *Id. See infra* Model Instruction 5.84A. *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 978 (8th Cir. 2005)

If the plaintiff is alleging the defendant's stated reason for its employment action is a pretext to hide discrimination, Model Instruction 5.95, *infra*, may be used.

Employment Cases - Family and Medical Leave Act (FMLA)

5.81I FMLA – FAILURE TO REINSTATE - ELEMENTS
(Qualifying Exigency Leave Related to Covered Military Member)

Your verdict must be for the plaintiff [and against defendant _____][1] if all of the following elements have been proved[2]:

[*First*, the plaintiff was eligible for leave[3]; and]

Second, a qualifying exigency (as defined in Instruction _____)[4] existed; and

Third, such qualifying exigency arose out of the fact that the plaintiff's [spouse, son, daughter, or parent] was on active duty or call to active duty status in support of a contingency operation[5] (as defined in Instruction _____); and

Fourth, such [spouse, son, daughter, or parent] was a member of the [Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve, or Coast Guard Reserve or was retired member of the Regular Armed Forces or Reserve];[6] and

[*Fifth*, the plaintiff gave the defendant timely notice (as defined in Instruction ____)[7] of [(his) (her)] need to be [absent from work] [8]][9] ; and

[*Sixth*, as soon as practicable (as defined in Instruction ____)[10], the plaintiff gave sufficient information so that the defendant knew or should have known that the absence was for a qualifying exigency arising out of the fact that the plaintiff's [spouse, son, daughter, or parent] was on active duty or call to active duty status in support of a contingency operation]] [11] ; and

Seventh, the plaintiff was absent from work because of such qualifying exigency; and

Eighth, the plaintiff was able to return to [(his) (her)] job at the expiration of the leave period; and

Ninth, the defendant refused to reinstate the plaintiff to the same or an equivalent position (as defined by Instruction____)[12] held by the plaintiff when the absence began.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction ___)].[13]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. See supra "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

4. Insert the number of the Instruction defining "qualifying exigency."

5. "The active duty orders of a covered military member will generally specify if the servicemember is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation."

6. Qualifying Exigency leave is not available where the family member is on active duty or call to active duty status in support of a contingency operation as a member of the Regular Armed Forces.

7. Reference to the instruction relating to the definition of "Timely Notice" should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a) or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

8. Insert language with respect to the nature of the leave that corresponds to the facts of the case.

9. This element is bracketed because "timely notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

10. Insert the number of the Instruction defining "as soon as practicable."

11. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant "knew" or "should have known" that the requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

12. Insert the number of the Instruction defining "equivalent position."

13. This language should be used when the defendant is submitting an affirmative defense.

5.81J FMLA – FAILURE TO REINSTATE - ELEMENTS (Employee Needed to Care for Covered Servicemember with a Serious Injury or Illness)

Your verdict must be for the plaintiff [and against defendant _____][1] if all of the following elements have been proved[2]:

[*First*, the plaintiff was eligible for leave[3]; and]

Second, the plaintiff [(is)(was)] the [spouse, son, daughter, parent, or next of kin (as defined in Instruction ___)[4]] of a covered servicemember (as defined in Instruction __);[5] and

Third, such covered servicemember [(has)(had)] a serious injury or illness (as defined in Instruction ___);[6] and

Fourth, the plaintiff was needed to care for (as defined in Instruction ____)[7] such covered servicemember; and

[*Fifth*, the plaintiff gave the defendant timely notice (as defined in Instruction ____)[8] of [(his) (her)] need to be [absent from work] [9]][10] ; and

[*Sixth*, as soon as practicable (as defined in Instruction ___)[11], the plaintiff gave sufficient information so that the defendant knew or should have known that the absence was for the need to care for a covered servicemember] [12] ; and

Seventh, the plaintiff was absent from work because [(he)(she)] was caring for such covered service member; and

Eighth, the plaintiff was able to return to [(his) (her)] job at the expiration of the leave period; and

Ninth, the defendant refused to reinstate the plaintiff to the same or an equivalent position (as defined by Instruction)[13] held by the plaintiff when the absence began.

However, your verdict must be for the defendant if any of the above elements has not been proved [or if the defendant is entitled to a verdict under (Instruction ___)].[14]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. Before an employee can exercise rights under the FMLA, he or she must be "eligible" for leave. See supra "Employees Eligible for Leave" section in 5.80. This element is bracketed here because it is anticipated that this element will be needed infrequently as eligibility issues will likely be decided as a matter of law. In the case where eligibility is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

4. Insert the number of the Instruction defining "next of kin" for a covered military member.

5. Insert the number of the Instruction defining "covered servicemember" for leave to care for a covered servicemember with a serious injury or illness.

6. Insert the number of the Instruction defining a "serious injury or illness" of a covered servicemember.

7. Insert the number of the Instruction defining "needed to care for."

8. Reference to the instruction relating to the definition of "Timely Notice" should be given depending on whether the leave was foreseeable, 30 days pursuant to 29 C.F.R. §825.302(a) or unforeseeable, less than 30 days pursuant to 29 C.F.R. §825.303(a).

9. Insert language with respect to the nature of the leave that corresponds to the facts of the case.

10. This element is bracketed because "timely notice" may not be a fact issue. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

11. Insert the number of the Instruction defining "as soon as practicable."

12. This element is bracketed because the sufficiency of the information or content of the notice so that the defendant "knew" or "should have known" that the

requested leave was FMLA qualifying leave may not be a fact issue. See §825.302(c) for foreseeable leave or 29 C.F.R. §825.303(b) for unforeseeable leave. If it is a fact issue, this element should be incorporated and the remaining elements renumbered accordingly.

13. Insert the number of the Instruction defining "equivalent position."

14. This language should be used when the defendant is submitting an affirmative defense.

5.82 FMLA - "SAME DECISION"

[If you find in favor of the plaintiff under Instruction ____,[1] then you must answer the following question in the verdict form[s]: Has it been proved[2] that the defendant would have [describe employment action taken, e.g., discharged][3] the plaintiff even if the defendant had not considered the plaintiff's [absence from work][4].][5]

Notes on Use

1. Insert the number or title of the essential elements Instruction here.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. Select the language that corresponds to the facts of the case.

4. It is anticipated that these instructions will be more commonly applied to cases in which the plaintiff actually took leave. However, the FMLA also protects an eligible employee whose leave request was denied by the employer. In such a situation, insert language that corresponds to the facts of the case.

5. The Eighth Circuit has held that the FMLA does not impose strict liability for all interferences with an employee's FMLA rights; an employer will not be held liable for interference with an employee's FMLA rights if the employer can prove it would have made the same decision had the employee not exercised rights under the FMLA. *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 977 (8th Cir. 2005).

Committee Comments

A defendant may avoid liability in a FMLA case if it convinces a jury that the plaintiff would have suffered the same adverse employment action even if he or she had not taken or requested FMLA leave.

5.83A FMLA - DEFINITION: "NEEDED TO CARE FOR"

An employee is "needed to care for" a spouse, son, daughter or parent with a serious health condition (as defined in Instruction _____)[1] or a covered servicemember (as defined in Instruction ____)[2] who is the employee's spouse, son, daughter, parent, or next of kin (as defined in Instruction ___)[3] when the family member or covered servicemember is unable to care for [(his) (her)] own basic medical, hygienic or nutritional needs or safety; or is unable to transport [(himself) (herself)] to the doctor. [The phrase also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse, or parent with a serious health condition (as defined in Instruction _____)[1] who is receiving inpatient or home care. The phrase also includes situations where the employee may be needed to fill in for others who are caring for the family member or covered servicemember, or to make arrangements for changes in care, such as transfer to a nursing home.[4]] The employee need not be the only individual or family member available to care for the family member or covered servicemember.

Notes on Use

1. Insert the number of the Instruction defining "serious health condition."

2. Insert the number of the Instruction defining "covered servicemember."

3. Insert the number of the Instruction defining "next of kin."

4. The definition of "needed to care for" is more expansive than it first appears for it includes situations in which the employee's presence or assistance would provide psychological comfort or assurance to a family member, and instances in which the employee may need to make arrangements for care. In cases in which any of these situations are applicable, this Instruction should be modified to include the additional definition(s). *See* 29 C.F.R. § 825.124(a), (b).

Committee Comments

This definition is taken from the FMLA regulations. 29 C.F.R. § 825.124(a)-(b).

5.83B FMLA - DEFINITION: "SERIOUS HEALTH CONDITION"

A "serious health condition" means an illness, injury, impairment or physical or mental condition that involves either 1) inpatient care in a hospital, hospice, or residential medical care facility, or 2) continuing treatment by a health care provider (as defined in Instruction _____)[1].

Notes on Use

1. Insert the number of the Instruction defining "health care provider."

Committee Comments

This relatively brief definition is the statutory definition. 29 U.S.C. § 2611(11). A more detailed definition is supplied by the FMLA regulations and included as an alternate definition in these model instructions. 29 C.F.R. § 825.113. *See infra* Model Instruction 5.83C.

5.83C FMLA - DEFINITION: "SERIOUS HEALTH CONDITION" (alternate)

The phrase a "serious health condition" as used in these instructions means an illness, injury, impairment, or physical or mental condition that involves:

[Inpatient care, which is an overnight stay,[1] in a hospital, hospice, or residential medical care facility, including any period of incapacity (inability to work, attend school or perform other regular daily activities), or any subsequent treatment in connection with the inpatient care)];

OR

[Incapacity plus treatment, which means a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive full, calendar days, including any subsequent treatment or period of incapacity relating to the same condition, that <u>also</u> involves:

1) In-person[2] treatment two or more times[3] by a health care provider (as defined in Instruction _____)[4], by a nurse under direct supervision of a health care provider (as defined in Instruction _____)[4], or by a provider of health services (for example, a physical therapist) under orders of, or on referral by, a health care provider (as defined in Instruction _____)[4]; or

2) In-person[2] treatment by a health care provider (as defined in Instruction _____)[2] on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider (as defined in Instruction _____)[2]];

OR

[Any period of incapacity (inability to work, attend school or perform other regular daily activities) due to pregnancy or for prenatal care];

OR

[A chronic health condition, which means a condition which requires periodic visits (at least two visits per year) for treatment by a health care provider (as defined in Instruction _____)[2], or by a nurse or physician's assistant under direct supervision of a health care provider (as defined in Instruction _____)[2], which continues over an extended period of time (including recurring episodes of a single underlying condition), and may cause episodes of incapacity (inability to work, attend school or perform other regular daily activities) rather than continuing incapacity];

OR

[A period of incapacity (inability to work, attend school or perform other regular daily activities) which is permanent or long-term due to a condition for which treatment may not be effective, but requires continuing supervision of a health care provider (as defined in Instruction _____)[2], even though the patient may not be receiving active treatment];

OR

[Any period of absence to receive multiple treatments (including any period of recovery from the treatments) by a health care provider (as defined in Instruction _____)[2], or by a provider of health care services under orders of, or on referral by, a health care provider (as defined in Instruction _____)[2], either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity (inability to work, attend school or perform other regular daily activities) of

more than three full consecutive calendar days in the absence of medical intervention or treatment.][2]

Notes to Use

1. The overnight stay requirement is included in 29 C.F.R. § 825.114.

2. The in-person requirement is included in 29 C.F.R. § 825.115(a)(3).

3. Unless extenuating circumstances exist, this treatment must be within 30 days of the first day of incapacity.

4. Select the language that corresponds to the facts of the case. Within each optional definition, the language also may need to be adjusted on a case-by-case basis due to varying facts. For example, the court may wish to delete the language "or by a nurse or physician's assistant under direct supervision of a health care provider" if the facts of the case do not indicate that treatment was provided by someone other than the health care provider.

Committee Comments

This instruction is based on the definition of "serious health condition" as set forth in the FMLA regulations at 29 C.F.R. § 825.113. *See infra* comments in section 5.80 for further discussion of the definition of a serious health condition.

5.83D FMLA - DEFINITION: "HEALTH CARE PROVIDER"

As used in these instructions the phrase "health care provider" includes [doctor of medicine, doctor of osteopathy, podiatrist, dentist, clinical psychologist, optometrist, nurse practitioner, nurse-midwife, or clinical social worker][1], so long as the provider is authorized to practice in the State and is performing within the scope of [(his) (her)] practice.

Notes on Use

1. The bracketed language is not exhaustive of the types of health care workers who can meet the regulatory definition of a health care provider. For a full discussion, see the Committee Comments. Insert the appropriate language to include the type of health provider(s) relevant to the case.

Committee Comments

The FMLA defines "health care provider" as:

> (A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or
>
> (B) any other person determined by the Secretary [of Labor] to be capable of providing health care services.

29 C.F.R. § 825.125(a)(1)(2).

The regulations promulgated by the Department of Labor define additional persons "capable of providing health care services" to include the workers described in the model Instruction as well as 1) chiropractors, if treatment is limited to "manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist;" 2) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts; 3) any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and 4) a health care provider who falls within one of the specifically mentioned categories who practices in a country other than the United States, so long as he or she is authorized to practice in accordance with the law of that country and is performing within the scope of his or her practice. The regulations state that "authorized to practice in the State" means that the health care provider must be authorized to diagnose and treat physical or mental health conditions without supervision by a doctor or other health care provider. 29 C.F.R. § 825.125(b).

5.83E FMLA - DEFINITION: "TIMELY NOTICE" - LEAVE FORESEEABLE[1]

The phrase "timely notice" as used in these instructions means that [(he) (she)] must have notified the defendant of [(his) (her)] need for leave at least 30 days before the leave was to begin. Absent unusual circumstances, the plaintiff must comply with the defendant's usual and customary notice requirements for requesting leave.

Notes on Use

1. This Instruction should be used in situations where the plaintiff's need for leave was foreseeable.

Committee Comments

The FMLA requires that employees provide adequate notice to their employers of the need to take leave. If the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment, an employee must give the employer at least 30 days advance notice before the leave is to begin. 29 C.F.R. § 825.302(a). *See also Bailey v. Amsted*, 172 F.3d 1041 (8th Cir. 1999). An employee need not invoke the FMLA by name in order to put an employer on notice that the FMLA may have relevance to the employee's absence from work. *Thorson v. Gemini*, 205 F.3d 370, 381 (8th Cir. 2000). *Nelson v. Arkansas Pediatric Facility*, 2001 WL 13291 (8th Cir. (Ark)). The adequacy of the notice in a FMLA context is a fact issue, not a question of law. *Sanders v. May Dep't Stores Co.*, 315 F.3d 940, 945 (8th Cir. 2003).

The FMLA also requires an employer to give appropriate notice. Whether an employer has satisfied its notice requirements is a jury issue. *Sanders*, 315 F.3d at 945. The employer must post a notice concerning the Act. 29 C.F.R. § 825.300(a). In addition, the employer must give written notice of an employee's rights under the Act after the employee has given timely and sufficient notice to the employer of the need for leave. 29 C.F.R. § 825.301(c); *Sanders*, 315 F.3d at 945.

5.83F FMLA - DEFINITION: "TIMELY NOTICE" - LEAVE UNFORESEEABLE[1]

The phrase "timely notice" as used in these instructions means that [(he) (she)] must have notified the defendant of [(his) (her)] need for leave as soon as practicable after [(he) (she)] learned of the need to take leave. Absent unusual circumstances, the plaintiff must comply with the defendant's usual and customary notice requirements for requesting leave.

Notes on Use

1. This Instruction should be used in situations where the plaintiff's need for leave was unforeseeable.

Committee Comments

The FMLA requires that employees provide adequate notice to their employers of the need to take leave. In the case of unexpected absences where 30 days advance notice is not possible, the regulations require the employee to give the employer notice "as soon as practicable." 29 C.F.R. § 825.302(a). *See also Bailey v. Amsted*, 172 F.3d 1041 (8th Cir. 1999). The regulations further state that ordinarily "as soon as practicable" requires the employee to give at least verbal notification within one or two business days after the employee learns of the need for leave. 29 C.F.R. § 825.302(b). *See also Browning v. Liberty Mutual Insurance Company*, 178 F.3d 1043, 1049 (8th Cir. 1999); *Carter v. Ford Motor Co.*, 121 F.3d 1146 (8th Cir. 1997). An employee need not invoke the FMLA by name in order to put an employer on notice that the FMLA may have relevance to the employee's absence from work. *Thorson v. Gemini*, 205 F.3d 370, 381 (8th Cir. 2000). *Nelson v. Arkansas Pediatric Facility*, 2001 WL 13291 (8th Cir. (Ark)). The adequacy of the notice in a FMLA context is a fact issue, not a question of law. *Sanders v. May Dep't Stores Co.*, 315 F.3d 940, 945 (8th Cir. 2003).

The FMLA also requires an employer to give appropriate notice. Whether an employer has satisfied its notice requirements is a jury issue. *Sanders*, 315 F.3d at 945. The employer must post a notice concerning the Act. 29 C.F.R. § 825.300(a). In addition, the employer must give written notice of an employee's rights under the Act after the employee has given timely and sufficient notice to the employer of the need for leave. 29 C.F.R. § 825.302(c); *Sanders*, 315 F.3d at 945.

5.83G FMLA - DEFINITION: "EQUIVALENT POSITION"

An "equivalent position" means a position that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties or responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

Committee Comments

This definition is taken from the FMLA regulations at 29 C.F.R. § 825.215(a). This is somewhat different than the approach taken by the ADA. An ADA plaintiff must demonstrate that he or she is unable to work in a broad range of jobs to show that he or she is unable to perform the major life activity of working and is, therefore, disabled for purposes of the ADA; a plaintiff who shows only an inability to perform his or her own job has not, therefore, made a showing of disability sufficient to entitle him or her to the protections of the ADA. 29 C.F.R. § 1630.2(j)(3)(i). However, a demonstration that an employee is unable to work in his or her job due to a serious health condition is enough to show the employee is incapacitated for purposes of the FMLA. 29 C.F.R. § 825.702(b); *Steckloff v. St. John's Mercy Health Systems*, 218 F.3d 858, 861 (8th Cir. 2000).

5.83H FMLA – DEFINITION: "QUALIFYING EXIGENCY"

A "qualifying exigency" is:

1. Short notice deployment which is when the covered family member is notified of an impending call or order to active duty in support of a contingency operation seven or less calendar days prior to the date of deployment; or

2. Attending military events and related activities such as official ceremonies, programs, or other military-sponsored events related to the active duty or call to active duty status of the covered military member; or

3. A.Attending family support or assistance programs and information briefings sponsored or promoted by the military, military service organizations, or the American Red Cross when such programs or briefings are related to the active duty or call to active duty status of the covered military member; or

4. Childcare and school activities (a) when the active duty or call to active duty status of the covered military member necessitates a change in the existing childcare arrangements; (b) to provide childcare on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need for such care arises from the active duty or call to active duty of the covered military member; (c) to enroll or transfer a child of the covered military member when the enrollment or transfer is necessitated by the active duty or call to active duty status of the covered military member; or (d) to attend meetings with the staff at a school or daycare facility of the child of the covered military member when the meetings are necessary due to circumstance arising from the active duty or call to active duty status of the covered military member; or

5. Making or updating financial or legal arrangements to address the covered military member's absence while on active duty or call to active duty status; or

6. Acting as the covered military member's representative before a federal, state, or local agency to obtain, arrange, or appeal military service benefits while the covered military member

is on active duty or call to active duty status and for ninety days following the termination of the covered military member's active duty status; or

7. Attending counseling for oneself, the covered military member, or the covered military member's child if the counseling is provided by someone other than a health care provider and the need for counseling arises from the active duty or call to active duty status of the covered military member; or

8. Spending up to five days with a covered military member for each short-term, temporary, rest and recuperation leave during deployment of the covered military member; or

9. Attending post deployment activities such as arrival ceremonies, reintegration briefings and events, and other military-sponsored official ceremonies or program for a period of ninety days following the termination of the covered family member's active duty status; or

10. Addressing issues that arise from the death of a covered military member while on active duty status; or

11. Addressing other events which arise out of the covered family member's active duty or call to active duty status provided that the employer and employee agree that such leave shall qualify as an exigency and agree to both the timing and duration of the leave.

Committee Comments

This definition is taken from the FMLA regulations. 29 C.F.R. § 825.126.

5.83I FMLA – DEFINITION: "NEXT OF KIN" FOR LEAVE TO CARE FOR A COVERED SERVICEMEMBER WITH A SERIOUS INJURY OR ILLNESS

For the purposes of determining entitlement to leave to care for a covered servicemember with a serious injury or illness, "next of kin" means nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA.

When no such designation is made and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered as the covered servicemember's next of kin. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin.

Committee Comments

This definition is taken from the FMLA regulations. 29 C.F.R. § 825.122(d).

5.83J FMLA – DEFINITION: "COVERED SERVICEMEMBER" FOR LEAVE TO CARE FOR A COVERED SERVICEMEMBER WITH A SERIOUS INJURY OR ILLNESS

A "covered servicemember" is a current member of the Armed Forces (including a member of the National Guard or Reserves) or a member of the Armed Forces, the National Guard or Reserves who is on the temporary disability retired list, who has a serious injury or illness incurred in the line of duty on active duty for which he or she is undergoing medical treatment, recuperation, or therapy; or otherwise in outpatient[1] status; or otherwise on the temporary disability retired list. This definition does not include former members of the Armed Forces, former members of the National Guard and Reserves, or members on the permanent disability retired list.

Note on Use

1. Outpatient status refers to the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

Committee Comments

This definition is taken from the FMLA regulations. 29 C.F.R. § 825.127(a).

5.83K FMLA – DEFINITION: "SERIOUS INJURY OR ILLNESS" FOR LEAVE TO CARE FOR A COVERED SERVICEMEMBER WITH A SERIOUS INJURY OR ILLNESS

A "serious injury or illness" means an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

Committee Comments

This definition is taken from the FMLA regulations. 29 C.F.R. § 825.127(a)(1).

5.83L FMLA – DEFINITION: "CONTINGENCY OPERATION"

A "contingency operation" means a military operation 1) that is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force, or 2) that results in the call or order to, or retention on, active duty of members of the uniformed services during a war or during a national emergency declared by the President or Congress.

Committee Comments

This definition is taken from the FMLA regulations. 29 C.F.R. § 825.126(b)(3).

5.83M FMLA - DEFINITION: "AS SOON AS PRACTICABLE"

The phrase "as soon as practicable" as used in these instructions means as soon as possible and practical, taking into account all of the facts and circumstances of the individual case.

Notes on Use

This definition is taken from the FMLA regulations. 29 C.F.R. § 825.302(b).

5.84 FMLA - EXCEPTION TO JOB RESTORATION (Key Employee)

Your verdict must be for the defendant if it has been proved[1] that the plaintiff was a key employee and that denying job restoration to the plaintiff was necessary to prevent substantial and grievous economic injury to the operations of the employer. In considering whether or not the plaintiff was a key employee you may consider factors such as whether the employer could replace the employee on a temporary basis, whether the employer could temporarily do without the employee, and if permanent replacement is unavoidable,[2] the cost of reinstating the employee.

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. This section is based upon the FMLA regulation contained in 29 C.F.R. § 825.218(b).

Committee Comments

An employer may deny job restoration to a "key employee" if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer. 29 C.F.R. § 825.216(c). In determining what constitutes a substantial and grievous economic injury, the focus should be on the extent of the injury to the employer's operations, not whether the absence of the employee will cause the injury. 29 C.F.R. § 825.218(a). This standard is different and more stringent than the "undue hardship" test under the Americans with Disabilities Act. 29 C.F.R. § 825.218(d). While a precise definition is not provided in the regulations, factors to consider in making that determination are provided at 29 C.F.R. § 825.218(b). They include whether the employer could replace the employee on a temporary basis, whether the employer could temporarily do without the employee, and the cost of reinstating the employee. *Id.*

The court may wish to define "key employee," which is defined by the FMLA regulation as a salaried employee who is eligible to take FMLA leave and who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employer's worksite. 29 C.F.R. § 825.217(a). The method of determining whether the employee is "among the highest paid 10 percent" is described in the FMLA regulations. 29 C.F.R. § 825.217(c). No more than 10 percent of the employer's employees within 75 miles of the worksite may be "key employees." 29 C.F.R. § 825.217(c)(2). The term "salaried" has the same meaning under the FMLA as it does under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, as amended. 29 C.F.R. § 825.217(b); 29 C.F.R. § 541.118.

5.84A FMLA - EXCEPTION TO JOB RESTORATION (Employee would not have been Employed at Time of Reinstatement)

Your verdict must be for the defendant if it has been proved[1] that the plaintiff would not have been employed by the defendant at the time job reinstatement was requested.

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

Committee Comments

An employer is not required to provide an employee returning from medical leave "any right, benefit or position of employment other than the right, benefit or position to which the employee would have been entitled had the employee never taken leave." 29 U.S.C. § 2614(a)(3)(B); *Marks v. The School Dist. of Kansas City, Mo*., 941 F. Supp. 886, 892 (W.D. Mo. 1996). Thus, an employee is not entitled to job reinstatement after FMLA leave if the employer can show that the employee would not otherwise have been employed at the time reinstatement is requested. 29 C.F.R. § 825.216(a). For example, an employer is not required to reinstate an employee who was laid off during the course of taking FMLA leave. 29 C.F.R. § 825.216(a)(1).

5.85 FMLA - ACTUAL DAMAGES

If you find in favor of the plaintiff under Instruction ____[1] then you must award the plaintiff the amount of any wages, salary, employment benefits, and other compensation[2] the plaintiff would have earned in [(his) (her)] employment with the defendant if [(he) (she)] had not been discharged on [fill in date of discharge] through the date of your verdict, *minus* the amount of earnings and benefits from other employment received by the plaintiff during that time.

[You are also instructed that the plaintiff has a duty under the law to "mitigate" [(his) (her)] damages – that is, to exercise reasonable diligence under the circumstances to minimize [(his) (her)] damages. Therefore, if it has been proved[3] that the plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to [(him) (her)], you must reduce [(his) (her)] damages by the amount [(he) (she)] reasonably could have avoided if [(he) (she)] had sought out or taken advantage of such an opportunity.][4]

[Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture and you must not award damages under this Instruction by way of punishment or through sympathy.][5]

Notes on Use

1. Insert the number or title of the essential elements instruction here.

2. The entitlement to "other compensation" is based upon 29 C.F.R. §825.400(c).

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. This paragraph is designed to submit the issue of "mitigation of damages" in appropriate cases. *See Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1061 (8th Cir. 2002);

Coleman v. City of Omaha, 714 F.2d 804, 808 (8th Cir. 1983); *Fieldler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808-09 (8th Cir. 1982).

5. This paragraph may be given at the trial court's discretion.

Committee Comments

The FMLA provides that a prevailing plaintiff is entitled to recover actual damages and interest thereon plus an additional equal amount as liquidated damages. 29 U.S.C. § 2617(a)(1); 29 C.F.R. § 825.400(c); *Morris v. VCW, Inc*., 1996 WL 740544 (W.D. Mo. 1996). In *Morris*, the court held that an employee could not recover interest because she failed to present evidence at trial regarding the method of calculating the amount of interest. *Id.* at *16.

Where a prevailing plaintiff has not lost wages, salary or employment benefits, he or she may be entitled to other compensation. 29 U.S.C. § 2617; 29 C.F.R. § 825.400(c). For example, an employee who was denied FMLA leave may be able to recover any monetary losses incurred as a direct result of the FMLA violation, such as the cost of providing for a family member, up to an amount equal to 12 weeks of wages or salary for the employee. 29 U.S.C. § 2617(a)(1).

In the Eighth Circuit, damages for emotional distress are not permitted. *Rodgers v. City of Des Moines*, 435 F. 3d 904 (8th Cir. 2006) (holding damages recoverable under the FMLA are strictly defined in the statute and measured by actual monetary losses).

Employment Cases - Family and Medical Leave Act (FMLA)

5.86 [DELETED]

5.87 FMLA - VERDICT FORM

Note: Complete the following paragraph by writing in the name required by your verdict.

On the [violation of the FMLA] [1] claim of plaintiff [John Doe], [as submitted in Instruction _____] [2], we find in favor of:

_____

(Plaintiff John Doe) or (Defendant XYZ, Inc.)

Note: Answer the next question only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberations on this claim.

Has it been proved[3] that the defendant would have (describe employment action taken, e.g., discharged) [4] the plaintiff regardless of [(his) (her)] (exercise of [(his) (her)] rights under the FMLA)? [5]

_____ Yes _____ No

(Mark an "X" in the appropriate space.)

Note: Complete the following paragraph only if your answer to the preceding question is "no." If you answered "yes" to the preceding question, have your foreperson sign and date this form because you have completed your deliberations on this claim.

We find the plaintiff's damages to be:

$_____ (stating the amount or, if none, write the word ("none").

_____

Foreperson

Dated: _____

5.90 MISCELLANEOUS INSTRUCTIONS AND SPECIAL INTERROGATORIES

5.92 SPECIAL INTERROGATORIES TO ELICIT FINDINGS IN BORDERLINE PRETEXT/MIXED-MOTIVE CASES

Your verdict in this case will be determined by your answers to the following questions. Read the questions and notes carefully because they explain the order in which the questions should be answered and which questions may be skipped.

Question No. 1: Has it been proved[1] that the plaintiff's (race)[2] was a determining factor in the defendant's decision to (discharge)[3] [(him) (her)]? "(Race) was a determining factor" only if the defendant would not have (discharged) the plaintiff but for the plaintiff's (race). It does not require that (race) was the only reason for the decision made by the defendant.[4] [You may find that (race) was a determining factor if it has been proved that the defendant's stated reason(s) for its decision are not the real reason(s), but are a pretext to hide (race) discrimination.][5]

____ Yes _____ No
(Mark an "X" in the appropriate space.)

Note: If you answered "yes" to Question No. 1, skip Questions 2 and 3, and continue on to Questions 4 and 5. If you answered "no" to Question No. 1, proceed to Question No. 2.

Question No. 2: Has it been proved that the plaintiff's (race) was a motivating factor[5] in the defendant's decision to (discharge) [(him) (her)]? (Race) was a "motivating factor" if the plaintiff's (race) played a part [or a role] in the defendant's decision to (discharge) the plaintiff. However, the plaintiff's (race) need not have been the only reason for the defendant's decision to (discharge) the plaintiff. [You may find that (race) was a motivating factor if it has been proved that the defendant's stated reason(s) for its decision are not the real reason(s), but are a pretext to hide (race) discrimination.][7]

_____ Yes _____ No
(Mark an "X" in the appropriate space.)

Note: If you answered "yes" to Question No. 2, continue on to Question No. 3. If you answered "no" to Question No. 1 and "no" to Question No. 2, you should have your foreperson sign and date this form because you have completed your deliberations on this (race) discrimination claim.

Question No. 3: Has it been proved that the defendant would have (discharged) the plaintiff regardless of [(his) (her)] race)?

_____ Yes _____ No
(Mark an "X" in the appropriate space.)

Note: Answer Questions 4 and 5 only if you answered "yes" to Question No. 1 or if you answered "yes" to Question No. 2 and "no" to Question No. 3. If you answered "yes" to Question No. 3, have your foreperson sign and date this form because you have completed your deliberations on this (race)-discrimination claim.

Question No. 4: State the amount of the plaintiff's actual damages as that term is defined in Instruction _____:[8] $_____ (stating the amount [or, if you find that the plaintiff's damages have no monetary value, write in the nominal amount of One Dollar ($1.00)]).[9]

Question No. 5: What amount, if any, do you assess for punitive damages as that term is defined in Instruction _____?[9] $_____ (stating the amount or, if none, write the word "none").

_____
Foreperson

Date: _____

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. This set of interrogatories is designed for use in race discrimination cases under 42 U.S.C. § 1981, in which it is unclear whether the correct standard for liability is "determining factor" or "motivating factor." It also may be appropriate in cases filed under 42 U.S.C. § 1983, the anti-retaliation provision of Title VII, or the Family Medical Leave Act. *See* Introduction to Section 5.

3. These interrogatories are designed for use in a discharge case. In a "failure to hire," "failure to promote," or "demotion" case, the interrogatories must be modified. Where the plaintiff resigned but claims that he or she was "constructively discharged," an additional

interrogatory should be given as a threshold to the interrogatories shown above and the subsequent interrogatories will have to be renumbered. *See infra* Model Instruction 5.93.

4. The explanation of the phrase "(race) was a determining factor" is based on *Grebin v. Sioux Falls Indep. School Dist. No. 49-5*, 779 F.2d 18, 20 n.1 (8th Cir. 1985).

5. The bracketed phrase may be added at the court's option.

6. The Committee believes that the term "motivating factor" should be defined. *See infra* Model Instruction 5.96.

7. The bracketed phrase may be added at the court's option.

8. Fill in the number of the "actual damages" instruction here. *See supra* Model Instruction 5.22A (§ 1981 cases), 5.27A (§ 1983 cases), 5.02A (Title VII retaliation cases).

9. Fill in the number of the "punitive damages" instruction here. *See, e.g.*, Model Instruction 5.22C. If these interrogatories are used in an FMLA case, this question should be deleted in favor of a question on the issue of "good faith." *See* Model Instruction 5.86.

Committee Comments

In *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), the Supreme Court ruled that "motivating factor/same decision" instructions should be given in Title VII discrimination cases, regardless of whether the plaintiff relies on "direct evidence" or circumstantial/pretext evidence. In *Gross v. FBL Financial Services, Inc.*, ___ U.S. ___, 129 S. Ct. 2343 (2009), the Supreme Court ruled that "motivating factor/same decision" burden-shifting instructions should not be given in ADEA cases.

The *Costa* and *Gross* decisions did not address whether the direct evidence/pretext distinction (and the corresponding use of a "motivating factor/same decision" or "determining factor" standard) remains viable in cases filed under § 1981, § 1983, the anti-retaliation provision of Title VII, or the FMLA.

These special interrogatories are designed for use when the trial court believes that the mixed motive/pretext distinction may still exist. For example, if the plaintiff files suit under section 1981 and offers "direct evidence" of race discrimination, these interrogatories will permit the court to create a complete record to permit analysis under either theory.

Question No. 1 is designed to test the ultimate issue in a "pretext" case of whether the plaintiff's race or other protected characteristics was a "determining factor" in the employment decision being challenged. As reflected in the note following Question No. 1, the plaintiff prevails under either a pretext or mixed motive theory if the jury finds that unlawful discrimination was a "determining factor." Thus, analysis on the issue of liability should end if the jury answers "yes" to Question No. 1. The jury must go on to Question No. 2 only if it has not been proved that discrimination was a "determining factor."

Question No. 2 is designed to test the proof on the "motivating factor" issue. The note following Question No. 2 directs the jury to continue in its analysis only if it answers "yes" to

this question. If the jury does not find that unlawful discrimination was a motivating factor, judgment should be entered for the defendant on this claim.

Question No. 3 is designed to reach the final issue in a "mixed motive" case. As noted above, the plaintiff clearly prevails if the jury answers "yes" to Question No. 1 and the defendant clearly prevails if the jury reaches and answers "no" to Question No. 2. It also is clear that the defendant prevails if the jury reaches and answers "yes" to Question No. 3. Thus, the court will need to revisit the issue of whether a case should be classified as "mixed motive" or "pretext" only if the jury reaches Question No. 3 and only if the jury answers "no" to that question. Based on this set of jury findings, the plaintiff prevails if the case is classified under a "mixed motive" theory, while the defendant prevails if the case is classified under a "pretext" case theory.

Questions 1, 2 and 3 are to be submitted in lieu of an elements instruction. However, actual damages and, if appropriate, a punitive damages instruction (or a “good faith” instruction in FMLA cases) must also be submitted. The Committee makes no recommendation regarding whether all issues should be submitted to the jury simultaneously or whether jury deliberations should be bifurcated, with the issues of actual damages and punitive damages (or “good faith”) being submitted separately from Questions 1, 2 and 3.

5.93 CONSTRUCTIVE DISCHARGE

First, the defendant made the plaintiff's working conditions intolerable, and

Second, the plaintiff's (age, race, gender, religion)[1] was a motivating factor[2] in the defendant's actions, and

Third, [the defendant acted with the intent of forcing the plaintiff to quit] or [the plaintiff's resignation was a reasonably foreseeable result of the defendant's actions][3].

Working conditions are intolerable if a reasonable person in the plaintiff's situation would have deemed resignation the only reasonable alternative.[4]

Notes on Use

1. Appropriate language should be chosen to reflect the alleged basis for the discrimination. Other prohibited conduct, such as retaliation against someone who has complained of discrimination, may be appropriate.

2. If the trial court decides to submit the case under a "determining factor" liability standard, this instruction should be modified and an appropriate definition of the term "determining factor" should be included.

3. Select the appropriate phrase or, in some cases both phrases separated by "or" depending on the evidence. *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 n.13 (8th Cir. 2000) ("To establish her constructive discharge, Ogden needed to show that a reasonable person would have found the conditions of her employ intolerable *and that the employer either intended to force her to resign or could have reasonably foreseen she would do so as a result of its actions*".) (Emphasis added.)

4. This paragraph aids the jury by providing a definition of what constitutes intolerable working conditions, and explains that the standard is an objective one. *See Williams v. City of Kansas City, Missouri*, 223 F3d 749, 753-54 (8th Cir. 2000) (Williams did not show that her resignation was objectively reasonable where she quit without giving her employer a chance to fix the problem); *see also Phillips v. Taco Bell Corp.*, 156 F.3d 884, 890 (8th Cir. 1998) (an employee "has an obligation not to assume the worse and jump to conclusions too quickly.").

Committee Comments

This instruction is designed for use in connection with the essential elements instruction in cases where the plaintiff resigned but claims that the employer's discriminatory actions forced him or her to do so. *See Barrett v. Omaha National Bank*, 726 F.2d 424, 428 (8th Cir. 1984) ("[a]n employee is constructively discharged when he or she involuntarily resigns to escape intolerable and illegal employment requirements"); *Hukkanen v, International Union of Operating Engineers, Hoisting & Portable Local No.101*, 3 F.3d 281, 285 (8th Cir. 1993) ("[c]onstructive discharge plaintiffs thus satisfy Bunny Breads' intent requirement by showing

their resignation was a reasonably foreseeable consequence of their employer's discriminatory actions," thus, adding an alternative method of meeting the standard announced in *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981) (employer's actions "must have been taken with the intention of forcing the employee to quit")). *See also Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 n.13 (8th Cir. 2000) ("To establish her constructive discharge, Ogden needed to show that a reasonable person would have found the conditions of her employ intolerable *and that the employer either intended to force her to resign or could have reasonably foreseen she would do so as a result of its actions*.) (Emphasis added.) This instruction should be used in lieu of the first and second elements in the essential elements instructions. *See infra* Model Instructions 5.01 (Title VII), 5.11A and B (ADEA), 5.21A and B (42 U.S.C. § 1981), 5.26A and B (42 U.S.C. § 1983).

5.94 BUSINESS JUDGMENT - TITLE VII CASES

You may not return a verdict for the plaintiff just because you might disagree with the defendant's (decision)[1] or believe it to be harsh or unreasonable.

Notes on Use

1. This instruction makes reference to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct"--is more appropriate.

Committee Comments

In *Walker v. AT&T Technologies*, 995 F.2d 846 (8th Cir. 1993), the Eighth Circuit ruled that it is reversible error to deny a defendant's request for an instruction which explains that an employer has the right to make subjective personnel decisions for any reason that is not discriminatory. This instruction is based on sample language cited in the Eighth Circuit's opinion. *See Walker*, 995 F.2d at 849; *cf. Blake v. J.C. Penney Co.*, 894 F.2d 274, 281 (8th Cir. 1990) (upholding a different business judgment instruction as being sufficient).

5.95 PRETEXT

You may find that the plaintiff's (age) (race) (sex)[1] was a [motivating] [determining][2] factor in the defendant's (decision)[3] if it has been proved[4] that the defendant's stated reason(s) for its (decision) [(is) (are)] not the real reason, but [(is) (are)] a pretext to hide [(age) (sex) (race)] discrimination. [5]

Notes on Use

1. Choose the appropriate word.

2. Choose the same word as used in the elements instruction.

3. This instruction makes references to the defendant's "decision." It may be modified if another term--such as "actions" or "conduct" – would be more appropriate.

4. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

5. *See Moore v. Robertson Fire Protection Dist.*, 249 F.3d 786, 790 n.9 (8th Cir. 2001), which states "[w]e do not express any view as to whether it ever would be reversible error for a trial court to fail to give a pretext instruction, though we tend to doubt it.".

Committee Comments

The plaintiffs can establish unlawful bias through "either direct evidence of discrimination *or* evidence that the reasons given for the adverse action are a pretext to cloak the discriminatory motive." *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1063 (8th Cir. 1988) (emphasis added). "[A]n employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." *MacDissi v. Valmont Indus., Inc.*, 856 F.2d 1054, 1059 (8th Cir. 1988). This instruction, which is based on *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), may be used in conjunction with the essential elements instruction when the plaintiff relies substantially or exclusively on "indirect evidence" of discrimination. In an attempt to clarify this standard, the Eighth Circuit, in *Ryther v. KARE 11*, 108 F.3d 832 (8th Cir. 1997), stated:

> In sum, when the employer produces a nondiscriminatory reason for its actions, the prima facie case no longer creates a legal presumption of unlawful discrimination. The *elements* of the prima facie case remain, however, and if they are accompanied by evidence of pretext and disbelief of the defendant's proffered explanation, they may permit the jury to find for the plaintiff. This is not to say that, for the plaintiff to succeed, simply proving pretext is necessarily enough. We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination.

Id. at 837 (footnote omitted).

The Committee believes pretext evidence can support a jury decision when either a motivating or determining factor is required. *Ryther v. KARE II*, 864 F. Supp. 1510, 1521 (D. Minn. 1994) and *Ryther v. KARE*, 108 F.3d 832 (8th Cir. 1997).

5.96 DEFINITION OF MOTIVATING FACTOR

As used in these instructions, the plaintiff's (sex, gender, race, national origin, religion, disability)[1] was a "motivating factor," if the plaintiff's (sex, gender, race, national origin, religion, disability) played a part[2] [or a role[3]][4] in the defendant's decision to _____[5] the plaintiff. However, the plaintiff's (sex, gender, race, national origin, religion, disability) need not have been the only reason for the defendant's decision to _____ the plaintiff.

Notes on Use

1. Here state the alleged unlawful consideration.

2. *See Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1101-02 (8th Cir. 1988).

3. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.")

4. Case law suggests that other language can be used properly to define "motivating factor." A judge may wish to consider the following alternatives:

The term "motivating factor," as used in these instructions, means a reason, alone or with other reasons, on which the defendant relied when it _____ the plaintiff[, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42 (1989);] or which moved the defendant toward its decision to _____ the plaintiff[, *id.* at 241;] or because of which the defendant _____ the plaintiff[, 29 U.S.C. § 623(a)(1) (ADEA); 42 U.S.C. § 2000e-2 (Title VII); 42 U.S.C. § 12112(a) (ADA)].

5. Here state the alleged adverse employment action.

Committee Comments

The Committee recommends giving this definition. A court may decide that the term "motivating factor" need not be defined expressly because its common definition is also the applicable legal definition. "Motivating" is often used in a direct evidence, mixed-motive case brought under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), to signify the multiple factors, at least one of which is assertedly unlawful, which caused the adverse employment decision. 42 U.S.C. § 2000e-2(m); *Beshears v. Asbill*, 930 F.2d 1348, 1353-54 (8th Cir. 1991) (ADEA case); *Parton v. GTE North, Inc.*, 971 F.2d 150, 153 (8th Cir. 1992). "Determining factor" is appropriate in an indirect evidence, pretext case brought under the decisional format of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Ryther v. Kare II*, 108 F.3d 832 (8th Cir. en banc 1997); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1101-02 (8th Cir. 1988).

5.97 AFTER-ACQUIRED EVIDENCE[1]

If your verdict is in favor of the plaintiff under Instruction No. ___,[2] and if you answered "no" to Question No. 1,[3] then you must answer the following question on your verdict form:

> Question No. 2: Has it been proved[4] that, even if the plaintiff had not been terminated on [insert appropriate date], the defendant would have terminated[5] the plaintiff's employment by [insert appropriate date][6] because [insert brief explanation of the defendant's after-acquired reason for termination.][7] ?

Notes on Use

1. This instruction is intended for potential use in cases involving claims of wrongful termination or other adverse employment actions resulting in economic loss to the plaintiff. When given, it ordinarily will be inserted after the essential elements instruction (or, when given, after the "same decision" instruction) and before the actual damages instruction. In addition to instructing on this issue, the verdict form will need to be modified. *See infra* Model Instruction 5.97A.

2. Insert the number of the "essential elements" instruction given.

3. Insert the number of the "same decision" instruction given. If a "same decision" instruction is not given, this phrase should be deleted.

4. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

5. The after-acquired evidence defense typically is asserted by the defendant to cut off liability for economic damages by suggesting that the plaintiff would have been terminated if it had been aware of the after-acquired evidence of misconduct. When the defense is based on a different fact pattern -- e.g., the defendant asserts that the plaintiff would have been demoted or transferred to a lower-paying job if it had known of the after-acquired evidence -- the appropriate job action should be identified.

6. Insert the appropriate date based upon the defendant's contention of when the plaintiff would have been terminated as a result of the after-acquired evidence.

7. Describe the basis for the defendant's after-acquired evidence defense -- e.g. "the plaintiff's misrepresentation in [(his) (her)] employment application" or "the plaintiff's falsification of expense reports."

Employment Cases - Miscellaneous Instructions and Special Interrogatories

Committee Comments

In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S.352 (1995), the Supreme Court ruled that an employer's after-acquired evidence of misconduct by the plaintiff does not act as a bar to liability, but it may cut off the plaintiff's damages as of the date the employer discovered the misconduct. The after-acquired evidence doctrine appears to be an affirmative defense which must be pleaded and proven by the employer-defendant.

To establish an after-acquired evidence defense to damages, the employer must establish that "the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of discharge." *McKennon*, 513 U.S. at 362-63. It is not enough to show that the misconduct was in violation of company policy or might have justified termination; instead, the employer must show that the after-acquired evidence would have resulted in termination. *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1048 (7th Cir. 1999) ("[p]roving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made") (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989)).

The plaintiff-employee cannot circumvent the after-acquired evidence defense by suggesting that the defendant-employer discovered the prior misconduct during the course of discovery. "Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery and even if the information might have gone undiscovered absent the suit." *McKennon*, 513 U.S. at 362.

5.97A MODIFIED VERDICT FORM IN AFTER-ACQUIRED EVIDENCE CASES

Note: Complete the following paragraph by writing in the name required by your verdict.

On the [(sex)[1] discrimination][2] claim of plaintiff [Jane Doe], [as submitted in Instruction ___][3], we find in favor of:

_____

(Plaintiff Jane Doe) or (Defendant XYZ, Inc.)

Note: Answer the next question only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberations on this claim.

Question No. 1: Has it been proved[4] that the defendant would have discharged[5] the plaintiff on [date on which the plaintiff was discharged] regardless of [(his) (her)] (sex)?[6]

_____ Yes _____ No
(Mark an "X" in the appropriate space)

Note: Complete the following paragraphs only if your answer to the preceding question is "no." If you answered "yes" to the preceding question, have your foreperson sign and date this form because you have completed your deliberations on this claim.

Question No. 2: Has it been proved that, even if the plaintiff had not been terminated on [insert appropriate date][7], the defendant would have terminated the plaintiff's employment by [insert appropriate date] because [insert brief explanation of the defendant's after-acquired reason for termination.][8]?

____ Yes ____ No
(Mark an "X" in the appropriate space)

Note: Continue on to the following paragraphs regardless of how you answered Question No. 2.

We assess the plaintiff's damages as follows:

A. Lost wages and benefits from [date of actual termination] through [date used in after-acquired evidence instruction]:

$_____ (stating the amount [or, if none, write the word "none"])

B. Lost wages and benefits from [date used in after-acquired evidence instruction] through the date of your verdict[9]:

$_____ (stating the amount [or, if none, write the word "none"])

C. The plaintiff's other damages, excluding past and future lost wages and benefits:

$_____ (stating the amount [or, if you find that the plaintiff's damages do not have a monetary value, write in the nominal amount of One Dollar ($1.00)]).[10]

[We assess punitive damages against the defendant, as submitted in Instruction ___, as follows:

$_____ (stating the amount or, if none, write the word "none").][11]

_____
Foreperson

Dated: _____

Employment Cases - Miscellaneous Instructions and Special Interrogatories

Notes on Use

1. This verdict form is designed for use in a gender discrimination case. It must be modified if the plaintiff is claiming discrimination based on race, religion, age, or some other theory factor.

2. The bracketed phrase should be submitted when the plaintiff submits multiple claims to the jury.

3. The number or title of the "essential elements" instruction may be inserted here.

4. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

5. *See infra* Model Instruction 5.97 n.5.

6. This question submits the "same decision" issue to the jury. *See infra* Model Instruction 5.01A.

7. *See infra* Model Instruction 5.97 n.6.

8. *See infra* Model Instruction 5.97 n.7.

9. Although the after-acquired evidence defense would bar recovery of economic damages accruing after the date of discovery of the after-acquired basis for termination, Subparagraph B nevertheless is designed to elicit this finding in the event the after-acquired evidence defense is overruled as a matter of law via post-trial motions or appeal. Front pay is an equitable issue for the judge to decide. *Excel Corp. v. Bosley*, 165 F.3d 635, 639 (8th Cir. 1999) (Title VII case).

10. The Committee takes no position on whether (or to what degree) the after-acquired evidence defense might impact the recovery of compensatory damages. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995) was an ADEA case in which the plaintiff's remedy was limited to economic damages.

11. This paragraph should be included if the evidence is sufficient to support an award of punitive damages. *See supra, e.g.,* Model Instruction 5.02C.

Committee Comments

This model instruction illustrates the modifications to the verdict form in cases where the after-acquired evidence defense is submitted. *See supra* Model Instruction 5.97; *see also supra* Model Instructions 5.03 (Title VII Verdict Form); 5.13 (ADEA Verdict Form); 5.23 (§ 1981 Verdict Form); 5.28 (§ 1983 Verdict Form); 5.73 (First Amendment Verdict Form).

6. FRAUD CASES

Fraud Cases

6.01 FRAUD - ODOMETER

Your verdict must be for the plaintiff [and against defendant _____][1] [here generally describe the claim if there is more than one] if all of the following elements have been proved[2]:

First, that the defendant or its agent [disconnected, reset, or altered the odometer on the vehicle in question by changing the number of miles indicated thereon];[3] and

Second, that the action of the defendant or its agent was done with the intent to defraud[4] someone.[5]

To act with intent to defraud means to act with intent to deceive or cheat for the purpose of bringing some financial gain to one's self or another.

If any of the above elements has not been proved, your verdict must be for the defendant.

Notes on Use

1. Use this phrase if there are multiple defendants.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. The bracketed language should be used when the plaintiff's civil action is based upon a violation of 49 U.S.C. § 32703(2). If the action is premised on an alleged violation of 49 U.S.C. §§ 32703(3) or 32705. the element should be modified as follows:

a) section 32703(3) -

First, that the defendant or its agent operated the vehicle in question knowing that the odometer of such vehicle was disconnected or nonfunctional;

b) section 32705 -

First, that the defendant or its agent failed to provide an accurate written odometer disclosure statement on the vehicle in question at the time of its transfer;

4. Constructive knowledge, recklessness, or even gross negligence in determining or disclosing actual mileage is enough for the fact finder to reasonably infer intent to defraud. *Tusa v. Omaha Automobile Auction, Inc.*, 712 F.2d 1248 (8th Cir. 1983); *Ryan v. Edwards*, 592 F.2d 756 (4th Cir. 1979); *Nieto v. Pence*, 578 F.2d 640 (5th Cir. 1978). Mere negligence is not

enough. *See Huson v. General Motors Acceptance Corp.,* 108 F.3d 172 (8th Cir. 1997); *Bedsworth v. G & J Automotive, Inc.,* 650 F. Supp 763 (E.D. Mo. 1996).

5. Privity is unnecessary between the defrauded party and the party who violated the Motor Vehicle Information and Cost Savings Act with an intent to defraud. *Tusa v. Omaha Automobile Auction, Inc.* The plaintiff need only prove that the defendant intended to defraud someone.

Committee Comments

Sections 37023(1) and 37024, 49 United States Code, specify other actionable illegal acts not covered by this instruction.

Fraud Cases

6.51 ODOMETER FRAUD - DAMAGES

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained as a direct result of [insert appropriate language such as "the conduct of the defendant as submitted in Instruction _____"].

Damages include such things as the difference between the fair market value of the vehicle in question with its actual mileage and the amount paid for the vehicle by the plaintiff, and such sum as you find will fairly and justly compensate the plaintiff for any other damages sustained, including [insert list of appropriate other special damages requested].[1]

Notes on Use

1. Title 49 U.S.C. § 32710(a) also allows an award of expenses such as repair bills for defects that are directly related to the car's higher mileage and overpayment of insurance premiums and title and licensing fees attributable to the car's fraudulent inflation in value due to the lower mileage reading, provided these expenses are legitimately attributable to the defendant's acts. *Oettinger v. Lakeview Motors, Inc.*, 675 F. Supp. 1488, 1495-96 (E.D. Va. 1988); *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381 (D. Neb. 1977)..

Committee Comments

This instruction establishes a damage figure for the purposes of applying the minimum damage figure set by 49 U.S.C. § 32710(a). Under the provisions of this section, the plaintiff may, upon proper proof, recover three times the amount of actual damages he or she sustained, or $1,500, whichever is greater. *See Williams v. Toyota of Jefferson, Inc.*, 655 F. Supp. 1081 (E.D. La. 1987); *Beachy v. Eagle Motors, Inc.*, 637 F. Supp. 1093 (N.D. Ind. 1986); *Gonzales v. Van's Chevrolet, Inc.*, 498 F. Supp. 1102 (D. Del. 1980); *Duval v. Midwest Auto City, Inc.*, 425 F. Supp. 1381 (D. Neb. 1977). The Committee recommends that, in jury cases, the jury should be directed to determine the amount of actual damages and that the court should apply the statutory formula. *See Gonzales*.

Section 32710(6) of Title 49, United States Code, permits an award of reasonable attorney fees and costs to a prevailing plaintiff. The factors to be considered in awarding these fees are the same as in other civil rights cases. *See Blanchard v. Bergeron*, 489 U.S. 87 (1989); *Blum v. Stenson*, 465 U.S. 886 (1984).

Fraud Cases

6.51A ODOMETER FRAUD – Verdict Form

VERDICT

Note: Complete the following paragraph by writing in the name required by your verdict.

On the odometer fraud claim of plaintiff [name] against defendant [name] as submitted in Instruction ____[1], we find in favor of:

_____
(Plaintiff [name]) or (Defendant [name])

Note: Complete the following paragraph only if the above finding is in favor of the plaintiff. If the above finding is in favor of the defendant, have your foreperson sign and date this form because you have completed your deliberation on this claim.

We find plaintiff's damages as defined in Instruction ____[2] to be:

$_____

_____
Foreperson

Dated: _____

Notes on Use

1. The number or title of the "essential elements" instruction should be inserted here.
2. The number or title of the "actual damages" instruction should be inserted here.

7. FEDERAL EMPLOYERS' LIABILITY ACT
Introduction

The Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, commonly referred to as the "F.E.L.A.," makes railroads engaging in interstate commerce liable in damages to their employees for "injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U.S.C. § 51 (1939).

Although grounded in negligence, the statute does not define negligence; federal case law does so. *Urie v. Thompson*, 337 U.S. 163, 174 (1949). Generally, to prevail on an F.E.L.A. claim, a plaintiff must prove the traditional common law components of negligence including duty, breach, foreseeability, causation and injury. *Adams v. CSX Transp. Inc.*, 899 F.2d 536, 539 (6th Cir. 1990); *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987). This includes whether the defendant railroad failed to use reasonable or ordinary care under the circumstances. *Davis v. Burlington Northern, Inc.*, 541 F.2d 182, 185 (8th Cir. 1976); *McGivern v. Northern Pacific Ry. Co.*, 132 F.2d 213, 217 (8th Cir. 1942). Typically, it must be shown that the railroad either knew or should have known of the condition or circumstances that allegedly caused the plaintiff's injury. This is referred to as the notice requirement. *See Siegrist v. Delaware, Lackawanna & Western R. Co.*, 263 F.2d 616, 619 (2d Cir. 1959). Ordinarily, the plaintiff must prove that the railroad, with the exercise of due care, could have reasonably foreseen that a particular condition could cause injury, *Davis*, 541 F.2d at 185, although the exact manner in which the injury occurs and the extent of the injury need not be foreseen, *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 120 (1963).

Although grounded in negligence, the F.E.L.A. is "an avowed departure from the rules of the common law." *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 329 (1958). The Act's most distinctive departure from the common law is in the area of causation. The plain language of 45 U.S.C. § 51 (1939) establishes a standard of "in whole or in part" causation which replaces the common law standard of proximate causation. "[T]o impose liability on the defendant, the negligence need not be the proximate cause of the injury." *Nicholson v. Erie R. Co.*, 253 F.2d 939, 940 (2d Cir. 1958). In *CSX Transp. Inc. v. McBride*, ___ U.S. ___, 131 S.Ct. 2630 (2011), the United States Supreme Court reaffirmed the standard for causation in FELA cases set out in *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500 (1957). The Court held that, "Juries in such cases are properly instructed that a defendant railroad 'caused or contributed to' a railroad worker's injury 'if [the railroad's] negligence played a part – no matter how small – in bringing about the injury.' That, indeed, is the test Congress prescribed for proximate causation in FELA cases." *CSX* at 2636. The quantum of proof necessary to submit the question of

negligence to the jury and the quantum of proof necessary to sustain a jury finding of negligence are also modified under the F.E.L.A.

> It is well established that, under FELA, a case must go to the jury if there is any probative evidence to support a finding of even the slightest negligence on the part of the employer, *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506-07 (1957), and that jury verdicts in favor of plaintiffs can be sustained upon evidence that would not support such a verdict in ordinary tort actions, *Heater v. Chesapeake & Ohio Railway*, 497 F.2d 1243, 1246 (7th Cir.), *cert. denied*, 419 U.S. 1013 (1974).

Caillouette v. Baltimore & Ohio Chicago Terminal R. Co., 705 F.2d 243, 246 (7th Cir. 1983).

As the F.E.L.A. has modified the common law negligence case, it has also "stripped" certain defenses from the F.E.L.A. cause of action. *See Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 507-08 (1957). Contributory negligence is no bar to recovery. It may only be used to proportionately reduce the plaintiff's damages. 45 U.S.C. § 53. If the negligence of the plaintiff employee is the sole cause of his or her own injury or death, there is no liability because the railroad did not cause or contribute to cause the employee's injury or death. *New York Cent. R. Co. v. Marcone*, 281 U.S. 345, 350 (1930); *Meyers v. Union Pacific R. Co.*, 738 F.2d 328, 331 (8th Cir. 1984); *Flanigan v. Burlington Northern Inc.*, 632 F.2d 880, 883 (8th Cir. 1980); *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820, 827 (5th Cir. 1965). Although assumption of risk is abolished as a defense altogether, 45 U.S.C. § 54, evidence supporting the defense of contributory negligence should not be excluded merely because it also would support an assumption of the risk argument. *Beanland v. Chicago, Rock Island and Pac. R. Co.*, 480 F.2d 109, 116 n.5 (8th Cir. 1973).

Despite the foregoing authorities and F.E.L.A. principles, it must be kept in mind that the provisions of 45 U.S.C. § 51 which establish a negligence cause of action do not establish an absolute liability cause of action. "[T]he Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees." *Wilkerson v. McCarthy*, 336 U.S. 53, 61 (1949). "That proposition is correct, since the Act imposes liability only for negligent injuries." *Id.*; *cf. Tracy v. Terminal R. Ass'n of St. Louis*, 170 F.2d 635, 638 (8th Cir. 1948). The plaintiff has the burden to prove the elements of the F.E.L.A. cause of action, including the railroad's failure to exercise ordinary care, notice, reasonable foreseeability of harm, causation and damages.

In addition to the negligence cause of action of 45 U.S.C. § 51, the F.E.L.A. also provides for certain causes of action which are not based upon negligence. These are actions brought under the F.E.L.A. for injury caused by the railroad's violation of the

Safety Appliance Act (formerly 45 U.S.C. §§ 1-16, recodified as 49 U.S.C. §§ 20301-20304, 21302, 21304 (1994)), or the Boiler Inspection Act (formerly 45 U.S.C. §§ 22-23, recodified as 49 U.S.C. §§ 20102, 20701 (1994)).

Sometimes the same factual circumstances will give rise to a claim under the general negligence provision of the F.E.L.A., as well as a claim under the Safety Appliance Act or a claim under the Boiler Inspection Act. While the same facts may give rise to a combination of these three types of F.E.L.A. claims, the elements of an F.E.L.A. general negligence claim are separate and distinct from those of an F.E.L.A. Safety Appliance Act or F.E.L.A. Boiler Inspection Act claim.

The Safety Appliance Act and Boiler Inspection Act require that certain railroad equipment be kept in certain prescribed conditions. If the equipment is not kept in the prescribed conditions and an employee is thereby injured, the employee may bring a cause of action under 45 U.S.C. § 51. In such a case, proof of the violation of the Safety Appliance Act or Boiler Inspection Act supplies "the wrongful act necessary to ground liability under the F.E.L.A." *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 434 (1949). The Safety Appliance Act and Boiler Inspection Act thus "dispense, for the purposes of employees' suits with the necessity of proving that violations of the safety statutes constitute negligence; and making proof of such violations is effective to show negligence as a matter of law." *Urie*, 337 U.S. at 189. The United States Supreme Court "early swept all issues of negligence out of cases under the Safety Appliance Act." *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384, 390 (1949).

In other words, in F.E.L.A. cases brought for injury caused by violation of the Boiler Inspection Act or Safety Appliance Act, care on the part of the railroad is immaterial. "The duty imposed is an absolute one, and the carrier is not excused by any showing of care, however assiduous." *Brady v. Terminal R. Ass'n of St. Louis*, 303 U.S. 10, 15 (1938). Likewise, in such cases, care on the part of the employee is immaterial insofar as the defense of contributory negligence is not available to bar the plaintiff's action or to reduce the damages award. 45 U.S.C. § 53, However, if the plaintiff's negligence was the sole cause of the injury or death, then the statutory violation could not have contributed in whole or in part to the injury or death. *Beimert v. Burlington Northern, Inc.*, 726 F.2d 412, 414 (8th Cir. 1984).

Despite the elemental differences between these types of cases "(t)he appliance cause often is joined with one for negligence, and even sometimes . . . mingled in a single mongrel cause of action." *O'Donnell*, 338 U.S. at 391. In order to avoid such mingling, claims brought under the general F.E.L.A. negligence provisions of the Act, claims brought under the Safety Appliance Act and claims brought under the Boiler Inspection Act should all be submitted by separate elements instructions. *See infra* Model

Instructions 7.01 (elements instruction for claims brought under the general F.E.L.A. negligence provisions of the Act); Model Instruction 7.04 (elements instruction for claims brought under Boiler Inspection Act); Model Instruction 7.05 (elements instruction for claims brought under the Safety Appliance Act).

For a more thorough overview of the F.E.L.A. *see* Richter and Forer, *Federal Employers' Liability Act*, 12 F.R.D. 13 (1951) or Michael Beethe, *Railroads Swing Injured Employees: Should the Federal Employers' Liability Act Allow Railroads to Recover from Injured Railroad Workers for Property Damages?*, 65 U.M.K.C. L. Rev. 231 (1996)

Finally, a motivating purpose for Congress in enacting the F.E.L.A. was to simplify the common law negligence action which had previously provided the injured railroad worker's remedy.

> The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant . . . . [F]or practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit.

Rogers, 352 U.S. at 507-8 (footnotes omitted).

Given this purpose of the F.E.L.A. and the nature of the F.E.L.A. cause of action, the instructions in this section are drafted in the same format as are the other instructions in this manual generally. They are drafted to present the jury only those issues material to the questions it is to decide. Toward this goal, abstract statements of law and evidentiary detail are avoided.

A number of jurisdictions submit F.E.L.A. cases by instruction schemes which present propositions of law and paraphrase the underlying statutes. Notable among the jurisdictions which instruct in this manner are Illinois and Arkansas. Although the Committee has adopted the ultimate issue instruction format for this manual in general and the F.E.L.A. instructions in specific, the Committee recognizes that other instruction schemes are equally valuable. None of the instructions in this manual are mandatory, and any court which prefers to use another appropriate instruction set or system should do so.

Federal Employers' Liability Act (FELA)

7.01 GENERAL F.E.L.A. NEGLIGENCE

Your verdict must be for the plaintiff [and against (name of the defendant)][1] [on the plaintiff's (identify claim presented in this elements instruction as "*first*," "*second*," etc.) claim][2] if all of the following elements have been proved[3]:

First, [(the plaintiff) or (name of decedent)] was an employee of defendant [(name of the defendant)]; and[4, 5]

Second, defendant [(name of the defendant)] failed to provide:[6]

(reasonably safe conditions for work [in that (describe the conditions at issue)] or)

(reasonably safe tools and equipment [in that (describe the tools and equipment at issue)] or)

(reasonably safe methods of work [in that (describe the methods at issue)] or)

(reasonably adequate help [in that (describe the inadequacy at issue)]), and

Third, defendant [(name of the defendant)] in any one or more of the ways described in Paragraph *Second* was negligent;[7] and[8]

Fourth, that negligence played any part[9] in causing [injury to the plaintiff] [the death of (name of decedent)]. If any of the above elements has not been proved, then your verdict must be for defendant [(name of the defendant)].[10]

[Your verdict must be for (name of defendant) if you find in favor of (name of defendant) under Instruction ____ (insert number or title of affirmative defense instruction)].[11]

Notes on Use

1. If there are two or more defendants in the lawsuit, include this phrase and identify the defendant against whom the claim covered by this elements instruction is made.

2. Include this phrase and identify the claim covered by this elements instruction as *"first*," "*second*," etc., only if more than one claim is to be submitted. *See* Introduction to Section 7 (discussion of relationship among F.E.L.A. claims for general

negligence, violation of the Safety Appliance Act and violation of the Boiler Inspection Act).

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. The F.E.L.A. provides that the railroad "shall be liable in damages to any person suffering injury *while he is employed* by such carrier . . . ." 45 U.S.C. § 51 (1939) (emphasis added). In the typical F.E.L.A. case, there is no dispute as to whether the injured or deceased person was an employee, and this language need not be included except to make the instruction more readable. However, when there is such a dispute in the case, the term "employee" must be defined. The definition must be carefully tailored to the specific factual question presented, and it is recommended that RESTATEMENT (SECOND) OF AGENCY (1958) be used as a guideline in a manner consistent with the federal authorities. *See Kelley v. Southern Pacific Co.*, 419 U.S. 318, 324 (1974) (discussion of Restatement (Second) of Agency (1957) as authoritative concerning meaning of "employee" and "employed" under the F.E.L.A. and as source of proper jury instruction).

Sometimes employees of one company work on property or equipment owned by a railroad. In such situations, the individual can be said to be employed by the railroad if the railroad controlled or had the right to control the plaintiff's work. The passing of information and other coordinated efforts between employees of the two companies are not alone enough to satisfy this test. To find that the plaintiff was employed by the railroad, the railroad's employees must have had a supervisory role over the plaintiff's work. *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188, 198-99, 200-02 (8th Cir. 1981).

5. It may be argued the plaintiff was not acting within the scope of his or her railroad employment at the time of the incident. If there is a question whether the employee was within the scope of employment, paragraph *First* should provide as follows:

> *First*, [plaintiff] [(name of decedent)] was an employee of defendant [(name of the defendant)] acting within the scope of [(his) (her)] employment at the time of [(his) (her)] [injury] [death] [(describe the incident alleged to have caused injury or death)], and

If this paragraph is included, the term "scope of employment" must be defined in relation to the factual issue in the case. The RESTATEMENT (SECOND) OF AGENCY (1958) is recognized as a guide. *Wilson v. Chicago, Milwaukee, St. Paul and Pac. R. Co.*, 841 F.2d 1347, 1352 (7th Cir.), *cert. dism.*, 487 U.S. 1244 (1988). In rare cases it may be argued that the duties of the employee did not affect interstate commerce and thus are not covered by the Act. Usually if the employee was acting within the scope and course of

his or her employment for the railroad, his or her conduct will be sufficiently connected to interstate commerce to be included within the Act.

6. This paragraph of the elements instruction is designed to present descriptions of the conduct alleged to constitute breach of the railroad's standard of care in the majority of F.E.L.A. cases. These descriptions should focus the jurors' attention upon the evidence without belaboring the elements instruction with evidentiary detail. The description may consist of no more than the appropriate phrase or phrases "reasonably safe conditions for work," "reasonably safe tools and equipment," "reasonably safe methods of work" or "reasonably adequate help." *However, if a more specific description will be helpful to the jury and is deemed by the court to be desirable in the particular case, a more specific description should be used.* The following are examples of ways in which the applicable phrase may be modified to provide further description:

First, the defendant either failed to provide:

reasonably safe conditions for work in that there was oil on the walkway, or

reasonably safe tools and equipment in that it provided the plaintiff with a lining bar that had a broken claw, or

reasonably safe methods of work in that it failed to require the plaintiff to wear safety goggles while welding rail, or

reasonably adequate help in that it required the plaintiff to lift by himself a track saw that was too heavy to be lifted by one worker, and

7. The terms "negligent" and "negligence" must be defined. *See infra* Model Instructions 7.09, 7.10 and 7.11.

8. If only one phrase describing the railroad's alleged breach of duty is submitted in Paragraph *Second*, then Paragraph *Third* should read as follows:

Third, defendant [(name of the defendant)] was thereby negligent, and

9. The standard of causation in an F.E.L.A. case is whether the railroad's negligence played any part in causing the injury or death at issue. No other causation language is necessary.

The defendant may request an instruction stating that if the plaintiff's negligence was the sole cause of his or her injury, he or she may not recover under the F.E.L.A. *New York Central R. Co. v. Marcone*, 281 U.S. 345, 350 (1930); *Meyers v. Union Pacific R.R. Co.*, 738 F.2d 328, 330-31 (8th Cir. 1984) (not error to instruct jury, "if you find that the plaintiff was guilty of negligence, and that the plaintiff's negligence was the sole cause of his injury, then you must return your verdict in favor of defendant"). Such a defense may also arise under the Boiler Inspection and Safety Appliance Acts. *See Beimert v. Burlington Northern, Inc.*, 726 F.2d 412, 414 (8th Cir. 1984).

Sole cause instructions have sometimes been criticized as unnecessary and as confusing. *See Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 883-84 n.1 (8th Cir. 1980); *Almendarez v. Atchison, T. & S.F. Ry. Co.*, 426 F.2d 1095, 1097 (5th Cir. 1970); *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820, 826-27 (5th Cir. 1965). The Committee takes no position on whether a sole cause instruction should be given in an F.E.L.A. case. As is the case with any model instruction, if the court determines that some other instruction on the subject is appropriate, such an instruction may be given.

10. This paragraph should not be used if Model Instruction 7.02A or 7.02B is given.

11. Use Model Instruction 7.02C, *infra*, to submit affirmative defenses.

Committee Comments

The issues of actionable negligence and causation under F.E.L.A. recently received some attention. On June 23, 2011, the Supreme Court decided *CSX Transportation, Inc. v. McBride***,** --- U.S. ---, 131 S.Ct. 2630 (2011). The question presented to the Court was whether the Federal Employers' Liability Act requires proof of proximate causation. This is important to Jones Act cases because the Jones Act incorporates the standards of F.E.L.A. in seamen's personal injury suits. 46 U.S.C. § 30104. The F.E.L.A. statutory standard uses the language:

> for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . equipment.

45 U.S.C. § 51.

In *CSX Transportation, Inc.*, the Supreme Court maintained its earlier ruling in *Rogers v. Missouri Pac. R. Co.,* 352 U.S. 500, 77 S.Ct. 443 (1957). Justice Ginsburg, writing for the Court in *CSX*, summarized the Court's holding:

> [W]e conclude that [F.E.L.A.] does not incorporate "proximate cause" standards developed in nonstatutory common-law tort actions. The charge proper in FELA cases, we hold, simply tracks the language Congress employed, informing juries that a defendant railroad caused or contributed to a plaintiff employee's injury if the railroad's negligence played any part in bringing about the injury.

Id. at 2634. Also of note in the *CSX* opinion are the statements that it is unnecessary to use the label "proximate cause" when instructing the jury, *id*. at 2636, and that the following language is also appropriate when instructing the jury on causation in a F.E.L.A. case:

> Juries in such cases are properly instructed that a defendant railroad "caused or contributed to" a railroad worker's injury "if [the railroad's]

> negligence played a part--no matter how small--in bringing about the injury."

Id. at 2636.

Federal Employers' Liability Act (FELA)

7.02 DEFENSE THEORY INSTRUCTIONS - THREE OPTIONS
Introduction and Committee Comments

Eighth Circuit case law holds that the defendant in an F.E.L.A. case, like any party in any other civil case, is entitled to a specific instruction on its theory of the case, if the instruction is "legally correct, supported by the evidence and brought to the court's attention in a timely request." *Board of Water Works, Trustees of the City of Des Moines, Iowa v. Alvord, Burdick & Howson*, 706 F.2d 820, 823 (8th Cir. 1983). This proposition applies to F.E.L.A. cases. *Chicago & N.W. Ry. Co. v. Green*, 164 F.2d 55, 61 (8th Cir. 1947); *see also Chicago, Rock Island & Pacific Railroad Co. v. Lint*, 217 F.2d 279, 284-86 (8th Cir. 1954) (error to refuse the defendant's foreseeability of harm instructions which "more specifically" than the court's instructions presented the defendant's theory of defense); *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104, 1112-13 (8th Cir. 1988) (the defendant in products liability case may be entitled to a sole cause instruction presenting its theory of the case to the jury, if legally correct, supported by the evidence and brought to the court's attention in a timely request).

The 7.02 series of defense theory instructions provides for three alternative formats that a defendant may utilize to present its defense theory to the jury. If the defendant's theory is that the plaintiff has failed to carry his or her burden of proof on one or more of the elements of his or her claim set forth in the elements instruction, the Model Instruction 7.02A format permits instructing the jury that their verdict must be for the defendant unless that element has been proved. The 7.02B format is similar, but does not limit the defendant to the precise language used in the elements instruction. That is, the defendant can specify any fact which the plaintiff must prove in order to recover and obtain an instruction stating that the defendant is entitled to a verdict unless that fact is proved. The defendant may wish to use this format where the defense theory is that the plaintiff has failed to prove notice or reasonable foreseeability of harm.

The formats used in 7.02A and 7.02B are designed to cover defense theories where the plaintiff has failed to prove an element of his or her claim. The third category of defense theory instructions, as set forth in Model Instruction 7.02C, *infra*, is designed to cover affirmative defenses where the railroad has the burden of proof.

The court should limit the number of defense theory instructions so as not to unduly emphasize the defense theories in a way that would be unfair to the plaintiff. The Committee believes that as a general rule, the defendant should be entitled to at least one defense theory instruction for each claim that the plaintiff is separately submitting to the jury. There may be certain cases where more than one defense theory instruction should be given for a particular claim. For example, in an occupational lung disease case, there may be a statute of limitations defense hinging on fact issues to be decided by the jury and there also may be issues as to notice and reasonable foreseeability of harm. In such a case, the court might conclude to give a 7.02C instruction on the affirmative defense of statute of limitations and a 7.02B instruction covering the failure to prove notice or reasonable foreseeability of harm. If the defendant wants 7.02A and 7.02B instructions to be given in a case, they should be combined in a single defense theory instruction following the 7.02B format. Rather than creating an arbitrary limit on the number of

defense theory instructions that may be given, the Committee believes that it is preferable to give the court flexibility and discretion in dealing with each case on its own facts. The operative principles are fairness and evenhanded treatment.

Federal Employers' Liability Act (FELA)

7.02A FAILURE OF PROOF ON ANY ELEMENT OF THE PLAINTIFF'S CASE LISTED IN THE ELEMENTS

Your verdict must be for defendant [(name of the defendant)][1] [on the plaintiff's (identify claim presented in this instruction as "*first*," "*second*," etc.)[2] claim] unless it has been proved[3] that [(specify any element upon which the plaintiff bears the burden of proof as listed in the appropriate elements instruction for the particular claim)].

Notes on Use

1. If there are two or more defendants in the lawsuit, include this phrase and identify the defendant against whom the claim identified in this instruction is made.

2. Include this phrase and identify the claim represented in this instruction as "*first*," "*second*," etc., only if more than one claim is to be submitted. *See* Introduction to Section 7 (discussion of relationship among F.E.L.A. claims for general negligence, violation of the Safety Appliance Act and violation of the Boiler Inspection Act).

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

Committee Comments

See Introduction and Committee Comments to the 7.02 series of defense theory instructions for a discussion of the general principles underlying their use.

Model Instruction 7.02A, *infra*, provides a general format that can be used when the defendant's theory is that the plaintiff has failed to prove an element of his or her claim *as listed in the elements instruction*. When this format is used, the language in the elements instruction should be repeated verbatim in the defense theory instruction. For example, if the defense theory is the failure to prove causation, the instruction might read: "Your verdict must be for the defendant on the plaintiff's claim unless it has been proved that the defendant's negligence resulted in whole or in part in injury to the plaintiff."

The defendant may wish to specify in its defense theory instruction more than one element of the plaintiff's case that the defendant contends has not been proved. If the defendant specifies more than one element from the elements instruction, the defense theory instruction should use the same connecting term ("and" versus "or") as used in the elements instruction. In other words, in specifying conjunctive submissions, the defense theory instruction uses "and" between elements; in specifying disjunctive submissions, it uses "or."

The defendant has the option to specify one or more elements of the elements instruction in its defense theory instruction. The only limitation on the defendant's right to specify as much or as little of the elements instruction as desired is with respect to disjunctive submissions. If the defendant elects to specify any element which is submitted by the elements instruction in the

disjunctive, he or she must specify *all* such disjunctive elements. For example, if the plaintiff's elements instruction submits that the defendant either committed negligent act "A" *or* negligent act "B," it would be improper to give a defense theory instruction stating that the verdict must be for the defendant unless the jury believes that negligent act "A" has been proved. Instead, the defense theory instruction would have to specify all of the negligent acts submitted in the elements instruction connected by the word "or."

7.02B FAILURE TO PROVE ANY FACT ESSENTIAL TO THE PLAINTIFF'S RIGHT TO RECOVER

Your verdict must be for defendant [(name of the defendant)][1] [on the plaintiff's (identify claim as "*first*" "*second*," etc.) claim][2] unless it has been proved[3] that [(specify any fact which the plaintiff must prove in order to recover)].[4]

Notes on Use

1. If there are two or more defendants in the lawsuit, include this phrase and identify the defendant against whom the claim identified in this instruction is made.

2. Include this phrase and identify the claim represented in this instruction as "*first*," "*second*," etc., only if more than one claim is to be submitted. *See* Introduction to Section 7 (discussion of relationship among F.E.L.A. claims for general negligence, violation of the Safety Appliance Act and violation of the Boiler Inspection Act).

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. Of course, it is an issue of substantive law as to what facts are essential to the plaintiff's right to recover. See the examples in the Committee Comments above for instructions on the defense theories of failure to prove notice and failure to prove reasonable foreseeability of harm.

Committee Comments

See Introduction and Committee Comments to the 7.02 series of defense theory instructions for a discussion of the general principles underlying their use. If the defendant wants 7.02A and 7.02B instructions to be given in a case, they should be combined in a single defense theory instruction following the 7.02B format.

This defense theory instruction format is similar to the 7.02A format, but differs in that the defendant is not restricted to a repetition of the exact language used in the elements instruction. The 7.02B format is intended by the Committee to address the kind of instruction issues discussed in *Chicago & N.W. Ry. Co. v. Green*, 164 F.2d 55, 61 (8th Cir. 1947) and *Chicago, Rock Island & Pacific Railroad Co. v. Lint*, 217 F.2d 279, 284-86 (8th Cir. 1954). *See* Introduction and Committee Comments to 7.02 series of defense theory instructions.

The Committee anticipates that the 7.02B format can be used, for example, to instruct on the plaintiff's burden to prove "notice" and "reasonable foreseeability of harm." For a discussion of these concepts, *see infra* Committee Comments, Model Instruction 7.09.

The close and interdependent relationship of notice and reasonable foreseeability of harm to the ultimate question of whether the railroad exercised due care raises the issue whether the jury should be instructed to make separate findings of notice and reasonable foreseeability of

harm in the elements instruction. In *Atlantic Coast Line R. Co. v. Dixon*, 189 F.2d 525, 527-28 (5th Cir. 1951), and *Patterson v. Norfolk & Western Railway Company*, 489 F.2d 303, 305 (6th Cir. 1973), instructions calling for such separate findings were found improper in that they misrepresented the ultimate question of reasonable or ordinary care. However, in *Chicago, Rock Island & Pacific Railroad Co. v. Lint*, 217 F.2d 279, 284-86 (8th Cir. 1954), it was held error to refuse the defendant's notice and reasonable foreseeability of harm instructions which "more specifically" than the court's instructions presented the defendant's theory of defense. Similarly, in *Chicago & N.W. Ry. Co. v. Green*, 164 F.2d 55, 61 (8th Cir. 1947), it was error to refuse to give an instruction requested by the defendant on defendant's defense theory that the plaintiff had failed to prove notice. Other cases of interest are: *Denniston v. Burlington Northern, Inc.*, 726 F.2d 391, 393-94 (8th Cir. 1984) (no plain error in instructing that the plaintiff was required to prove notice); and *Baynum v. Chesapeake & Ohio Railway Co.*, 456 F.2d 658, 660 (6th Cir. 1972) (verdict for the plaintiff upon sufficient evidence of notice rendered refusal of notice instruction harmless error).

By way of illustration, assume that the plaintiff's submission of negligence is that the defendant failed to provide reasonably safe conditions for work in that there was oil on the walkway. Assume further that the defendant's theory of defense is that the defendant did not know and could not have known in the exercise of ordinary care that there was oil on the walkway. The defense theory instruction for this defense might read as follows: "Your verdict must be for the defendant unless it has been proved that the defendant knew or by the exercise of ordinary care should have known that there was oil on the walkway." In other words, a notice defense theory instruction should specify the defect, condition or other circumstance so it will be clear what fact or facts must be proved in order to establish notice.

Where the defendant claims it is not negligent because it did not have a reasonable opportunity to remove or repair a defect, such as a spill, the jury may be instructed as follows: "Your verdict must be for the defendant unless it has been proved that the defendant had a reasonable opportunity to [clean up the spill] before the plaintiff was injured."

As an example of a defense theory instruction on reasonable foreseeability of harm, assume a case where the plaintiff is claiming occupational lung disease caused by exposure to diesel fumes. The negligence submission from the elements instruction might read: "The defendant failed to provide reasonably safe conditions for work in that the plaintiff was repeatedly exposed to diesel fumes." The defense theory instruction on foreseeability of harm might read as follows: "Your verdict must be for the defendant unless it has been proved that the defendant knew or by the exercise of ordinary care should have known that repeated exposure to diesel fumes was reasonably likely to cause harm to the plaintiff."

While notice and foreseeability of harm are common defense theories that can be accommodated by the 7.02B format, this format is not limited to those particular theories. This format can be used to specify any fact upon which the plaintiff bears the burden of proof and which fact is essential to the plaintiff's right to recover. Of course, it is up to the court to determine what those "essential facts" might be under the case law and under the circumstances of the particular case before the court.

The 7.02B format should not be used to specify a fact upon which the defendant bears the burden of proof. If the defendant bears the burden of proof to establish the defense theory, the 7.02C format should be followed.

Federal Employers' Liability Act (FELA)

7.02C DEFENSE THEORY INSTRUCTIONS - AFFIRMATIVE DEFENSES

Your verdict must be for defendant [(name of the defendant)][1] [on the plaintiff's (identify claim to which this instruction pertains as "*first*," "*second*," etc.)[2] claim] if all of the following elements have been proved[3]:

[List in numbered paragraphs each element of any affirmative defense upon which the defendant bears the burden of proof and which, if proved, entitles the defendant to a verdict.]

Notes on Use

1. If there are two or more defendants in the lawsuit, identify the defendant to whom this instruction applies.

2. Include this bracketed language and identify the claim to which this instruction pertains as "*first*," "*second*," etc., only if more than one claim is submitted and one or more of such claims is not subject to the affirmative defense.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

Committee Comments

See Introduction and Committee Comments to the 7.02 series of defense theory instructions for a discussion of the general principles underlying their use.

The 7.02C format is only to be used for affirmative defenses where the defendant bears the burden of proof. For example, the affirmative defenses of release and statute of limitations sometimes turn on fact issues to be resolved by the jury. The Committee has not undertaken to prepare model instructions for affirmative defenses. If a particular case requires an affirmative defense instruction, the elements of the affirmative defense should be submitted in separate paragraphs connected by "and." Evidentiary detail should be avoided, but the ultimate factual issues to be resolved by the jury should be specified.

The 7.02C format should not be used in submitting the defense of contributory negligence which, if proved, only reduces the plaintiff's recovery. That defense should be submitted under Model Instruction 7.03, *infra*.

Assumption of the risk is no defense whatsoever because it has been abolished altogether in F.E.L.A. cases. 45 U.S.C. § 54 (1994).

The defendant may request a defense theory instruction stating that if the plaintiff's negligence was the sole cause of his or her injury, he or she may not recover under the F.E.L.A. For a discussion of the authorities on sole cause instructions, *see infra* Model Instruction 7.01 n.9. The Committee takes no position on whether a sole cause instruction should be given in an F.E.L.A. case.

Federal Employers' Liability Act (FELA)

7.03 F.E.L.A. CONTRIBUTORY NEGLIGENCE

If you find in favor of the plaintiff under Instruction _____ (insert number or title of the plaintiff's elements instruction) you must consider whether plaintiff [(name of decedent)][1] was also negligent. Under this Instruction, you must assess a percentage of the total negligence[2] to [plaintiff] [(name of decedent)] [on the plaintiff's (identify claim to which this instruction pertains as "*first*," "*second*," etc.) claim against defendant [(name of the defendant)]][3] if all of the following elements have been proved[4]:

First, [plaintiff] [(name of decedent)] (characterize the alleged negligent conduct, such as, "failed to keep a careful lookout for oncoming trains"),[5] and

Second, [plaintiff] [(name of decedent)] was thereby negligent, and[6]

Third, such negligence of [plaintiff] [(name of decedent)] resulted in whole or in part in [(his) (her)] injury.[7]

[If any of the above elements have not been proved, then you must not assess a percentage of negligence to [plaintiff] [(name of decedent)].][8]

Notes on Use

1. This contributory negligence instruction is designed for use in cases in which the employee's injury resulted in death as well as in cases in which the employee's injuries did not result in death. If the employee's injuries resulted in death, identify the decedent by name.

2. The terms "negligent" and "negligence" must be defined. *See infra* Model Instruction 7.09.

3. Include this bracketed language and identify the claim to which this instruction pertains as "*first*," "*second*," etc., only if more than one claim is submitted.

If there are two or more defendants in the lawsuit, identify the defendant against whom the claim referred to in this instruction is asserted.

4. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

5. More than one act or omission alleged to constitute contributory negligence may be here submitted in the same way that alternative submissions are made under Model Instruction 7.01. *See infra* Model Instruction 7.01 n.6.

6. If more than one act or omission is alleged as contributory negligence, then Paragraph Second should be modified to read as follows:

Second, [plaintiff] [(name of decedent)] in any one or more of the ways described in Paragraph *First* was negligent, and . . . .

7. A single standard of causation is to be applied to the plaintiff's negligence claim and the railroad's claim of contributory negligence. *Norfolk Southern Ry. Co. v. Sorrell*, 549 U.S. 159 (2007).

8. This paragraph is optional. If requested, the court may add this paragraph.

Committee Comments

Contributory negligence is no bar to recovery under F.E.L.A., "but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . . ." 45 U.S.C. § 53 (1994).

In a F.E.L.A. case brought for injury or death caused by the railroad's violation of a "statute enacted for the safety of employees," contributory negligence will neither bar the plaintiff's recovery nor reduce his or her damages. *Id.* The Safety Appliance Act (formerly 45 U.S.C. §§ 1-16, recodified at 49 U.S.C. §§ 20301-20304, 21302, 21304 (1994)), and the Boiler Inspection Act (formerly 45 U.S.C. §§ 22-23, recodified at 49 U.S.C. §§ 20102, 20701 (1994)), are statutes enacted for the safety of employees. Therefore, this instruction should not be submitted in a claim brought for violation of the Boiler Inspection Act (Model Instruction 7.04, *infra*) or for violation of the Safety Appliance Act (Model Instruction 7.05, *infra*). *See* Introduction to Section 7 (discussion of relationship among Boiler Inspection Act, Safety Appliance Act and F.E.L.A.).

Federal Employers' Liability Act (FELA)

7.04 F.E.L.A. BOILER INSPECTION ACT VIOLATION

Your verdict must be for the plaintiff [and against defendant (name of the defendant)][1] [on the plaintiff's (identify claim represented in this elements instruction as "*first*," "*second*," etc.) claim][2] if all of the following elements have been proved[3]:

First, plaintiff [(name of decedent)] was an employee of defendant [(name of the defendant)][4, 5]

Second, the [locomotive] [boiler] [tender] [(identify part or appurtenance of locomotive, boiler or tender which is the subject of the claim)][6] at issue in the evidence was not in proper condition and safe to operate without unnecessary peril to life or limb in that (identify the defect which is the subject of the claim),[7] and[8]

Third, this condition resulted in whole or in part[9] in [injury to the plaintiff] [death to (name of decedent)].

If any of the above elements has not been proved, then your verdict must be for defendant [(name of the defendant)].[10]

[Your verdict must be for the defendant if you find in favor of the defendant under Instruction ____ (insert number or title of affirmative defense instruction)].[11]

Notes on Use

1. If there are two or more defendants in the lawsuit, include this phrase and identify the defendant against whom the claim represented in this elements instruction is made.

2. Include this phrase and identify the claim represented in this elements instruction as "*first*," "*second*," etc., only if more than one claim is to be submitted.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. F.E.L.A. provides that the railroad "shall be liable in damages to any person suffering injury *while he is employed* by such carrier . . . ." 45 U.S.C. § 51 (emphasis added). In the typical F.E.L.A. case, there is no dispute as to whether the injured or deceased person was an employee, and this language need not be included except to make the instruction more readable. However, when there is such a dispute in the case, the term "employee" must be defined. The definition must be carefully tailored to the specific factual question presented, and it is recommended that RESTATEMENT (SECOND) OF AGENCY (1958) be used as a guide in a manner consistent with the federal authorities. *See Kelley v. Southern Pacific Company*, 419 U.S. 318,

324 (1974) (discussion of RESTATEMENT (SECOND) OF AGENCY (1958) as authoritative concerning meaning of "employee" and "employed" under F.E.L.A., and as source of proper jury instruction).

5. It may be argued the plaintiff was not acting within the scope of his or her railroad employment at the time of the incident. If there is a question whether the employee was within the scope of employment, paragraph *First* should provide as follows:

> *First*, [plaintiff] [(name of decedent)] was an employee of defendant [(name of the defendant)] acting within the scope of [(his) (her)] employment at the time of [(his) (her)] [injury] [death] [(describe the incident alleged to have caused injury or death)], and

If this paragraph is included, the term "scope of employment" must be defined in relation to the factual issue in the case. The RESTATEMENT (SECOND) OF AGENCY (1958) is recognized as a guide. *Wilson v. Chicago, Milwaukee, St. Paul and Pac. R. Co.*, 841 F.2d 1347, 1352 (7th Cir. 1988). In rare cases it may be argued that the duties of the employee did not affect interstate commerce and thus are not covered by the Act. Usually if the employee was acting within the scope and course of his or her employment for the railroad his or her conduct will be sufficiently connected to interstate commerce to be included within the Act.

6. The Boiler Inspection Act language of 49 U.S.C. § 2701, formerly 45 U.S.C. § 23, refers to the "locomotive or tender and its parts and appurtenances." The court should select the term which conforms to the case. The court may choose to specifically identify the specific part or appurtenance of the locomotive, boiler or tender in a case in which mere reference to the locomotive, boiler or tender will not adequately present the theory of violation.

7. Counsel should draft a concise statement of the Boiler Inspection Act violation alleged which is simple and free of unnecessary language. Examples which might be sufficient for a Boiler Act violation are: "in that there was oil on the locomotive catwalk;" or "in that the ladder on the locomotive was bent;" or "in that the grab iron on the locomotive was loose."

The Secretary of Transportation is authorized to establish standards for equipment covered under the Boiler Inspection Act and the Safety Appliance Act. *Shields v. Atlantic Coast Line R. Co.*, 350 U.S. 318, 320-25 (1956); *Lilly v. Grand Trunk Western R. Co.*, 317 U.S. 481, 486 (1943). Regulations promulgated pursuant to this authority are found in Title 49 of the Code of Federal Regulations under the Federal Railroad Administration (FRA) regulations. FRA regulations "acquire[] the force of law and become[] an integral part of the Act . . . ." *Lilly*, 317 U.S. at 488. Such regulations have "the same force as though prescribed in terms by the statute," *Atchison T. & S.F. Ry. Co. v. Scarlett*, 300 U.S. 471, 474 (1937), and violation of such regulations "are violations of the statute, giving rise not only to damage suits by those injured, but also to money penalties recoverable by the United States." *Urie v. Thompson*, 337 U.S. 163, 191 (1949) (citations omitted). If the plaintiff's case is based on a violation of such a regulation, the plaintiff may request the court to replace Paragraph Second of the instruction with a paragraph submitting the regulation violation theory. *See Eckert v. Aliquippa & Southern R. Co.*, 828 F.2d 183, 187 (3d Cir. 1987).

8. Both the Boiler Inspection Act and the Safety Appliance Act require that the equipment at issue be "in use" at the time of the subject incident. The purpose of the "in use" element is to "exclude those injuries directly resulting from the inspection, repair or servicing of railroad equipment located at a maintenance facility." *Angell v. Chesapeake & O. Ry. Co.*, 618 F.2d 260, 262 (4th Cir. 1980); *Steer v. Burlington Northern, Inc.*, 720 F.2d 975, 976-77 (8th Cir. 1983).

Whether the equipment at issue is "in use" at the time of the subject incident is to be decided by the court as a question of law and not by the jury. *Pinkham v. Maine Cent. R. Co.*, 874 F.2d 875, 881 (1st Cir. 1989) (citing *Steer*, 720 F.2d at 977 n.4). Because the "in use" element is a question of law for the court, this instruction does not submit the question to the jury.

Numerous reported cases discuss this element of the Boiler Inspection Act and Safety Appliance Act, and cases which construe the term "in use" under one act are authoritative for purposes of construing the term under the other act. *Holfester v. Long Island Railroad Company*, 360 F.2d 369, 373 (2d Cir. 1966). Any attempt to here represent the cases on point is beyond the scope of these Notes on Use, and counsel are referred to the authorities for further discussion of this element.

9. The same standard of "in whole or in part" causation which applies to general F.E.L.A. negligence cases prosecuted under 45 U.S.C. § 51 also applies to Boiler Inspection Act cases. *Green v. River Terminal Ry. Co.*, 763 F.2d 805, 810 (6th Cir. 1985) (citing *Carter v. Atlantic & St. Andrews Bay Railway Co.*, 338 U.S. 430, 434 (1949)).

The defendant may request an instruction stating that if the plaintiff's negligence was the sole cause of his or her injury, he or she may not recover under F.E.L.A. *New York Central R. Co. v. Marcone*, 281 U.S. 345, 350 (1930); *Meyers v. Union Pacific R. Co.*, 738 F.2d 328, 330-31 (8th Cir. 1984) (not error to instruct jury, "if you find that the plaintiff was guilty of negligence, and that the plaintiff's negligence was the sole cause of his injury, then you must return your verdict in favor of defendant"). Such a defense may also arise under the Boiler Inspection and Safety Appliance Acts. *See Beimert v. Burlington Northern, Inc.*, 726 F.2d 412, 414 (8th Cir. 1984).

Sole cause instructions have sometimes been criticized as unnecessary and as confusing. *See Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 883 n.1 (8th Cir. 1980); *Almendarez v. Atchison, T. & S.F. Ry. Co.*, 426 F.2d 1095, 1097 (5th Cir. 1970); *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820, 826-27 (5th Cir. 1965). The Committee takes no position on whether a sole cause instruction should be given in an F.E.L.A. case. If the court decides to give a sole cause type instruction, the following may be appropriate:

> The phrase "in whole or in part" as used in [this instruction] [Instruction _____ (state the title or number of the plaintiff's elements instruction)] means that the railroad is responsible if [describe the alleged Boiler Inspection Act violation], if any, played any part, no matter how small, in causing the plaintiff's injuries. This,

of course, means that the railroad is not responsible if any other cause, including the plaintiff's own negligence, was solely responsible.*

*This instruction may be given as a paragraph in the plaintiff's elements instruction or as a separate instruction.

Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 507 (1957); *Page v. St. Louis Southwestern Ry.*, 349 F.2d 820, 826-27 (5th Cir. 1965).

As is the case with any model instruction, if the court determines that some other instruction on the subject is appropriate, such an instruction may be given.

10. This paragraph should not be used if Model Instruction 7.02A or 7.02B is given.

11. Use Model Instruction 7.02C, *infra*, to submit affirmative defenses.

Committee Comments

The introduction to Section 7 discusses the relationship among the Boiler Inspection Act (formerly 45 U.S.C. §§ 22-23, recodified at 49 U.S.C. §§ 20102, 20701 (1994)), the Safety Appliance Act (formerly 45 U.S.C. §§ 1-16, recodified at 49 U.S.C. §§ 20301-20304, 21302, 21304 (1994)), and F.E.L.A., 45 U.S.C. §§ 51, 60 (1994).

Federal Employers' Liability Act (FELA)

7.05 F.E.L.A. SAFETY APPLIANCE ACT VIOLATION

Your verdict must be for the plaintiff [and against defendant (name of the defendant)][1] [on the plaintiff's (identify claim represented in this elements instruction as "*first*," "*second*," etc.) claim][2] if all of the following elements have been proved[3]:

First, plaintiff [(name of decedent)] was an employee of defendant [(name of the defendant)][4,5]

Second, (specify the alleged Safety Appliance Act violation),[6] and[7]

Third, the condition described in paragraph Second resulted in whole or in part[8] in [injury to the plaintiff] [death to (name of decedent)].

If any of the above elements has not been proved, then your verdict must be for defendant [(name of the defendant)].[9]

[Your verdict must be for the defendant if you find in favor of the defendant under Instruction ____ (insert number or title of affirmative defense instruction)].[10]

Notes on Use

1. If there are two or more defendants in the lawsuit, include this phrase and identify the defendant against whom the claim represented in this elements instruction is made.

2. Include this phrase and identify the claim represented in this elements instruction as "*first*," "*second*," etc., only if more than one claim is to be submitted.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. The F.E.L.A. provides that the railroad "shall be liable in damages to any person suffering injury *while he is employed* by such carrier . . . ." 45 U.S.C. § 51 (1939) (emphasis added). In the typical F.E.L.A. case, there is no dispute as to whether the injured or deceased person was an employee, and this language need not be included except to make the instruction more readable. However, when there is such a dispute in the case, the term "employee" must be defined. The definition must be carefully tailored to the specific factual question presented, and it is recommended that RESTATEMENT (SECOND) OF AGENCY (1958) be used as a guide in a manner consistent with the federal authorities. *See Kelley v. Southern Pacific Company*, 419 U.S. 318, 324 (1974) (discussion of RESTATEMENT (SECOND) OF AGENCY (1958) as authoritative concerning meaning of "employee" and "employed" under the F.E.L.A. and as source of proper jury instruction).

5. It may be argued the plaintiff was not acting within the scope of his or her railroad employment at the time of the incident. If there is a question whether the employee was within the scope of employment, paragraph *First* should provide as follows:

> *First*, [plaintiff] [(name of decedent)] was an employee of defendant [(name of the defendant)] acting within the scope of [(his) (her)] employment at the time of [(his) (her)] [injury] [death] [(describe the incident alleged to have caused injury or death)], and

If this paragraph is included, the term "scope of employment" must be defined in relation to the factual issue in the case. The RESTATEMENT (SECOND) OF AGENCY (1958) is recognized as a guide. *Wilson v. Chicago, Milwaukee, St. Paul and Pac. R. Co.*, 841 F.2d 1347, 1352 (7th Cir. 1988). In rare cases it may be argued that the duties of the employee did not affect interstate commerce and thus are not covered by the Act. Usually if the employee was acting within the scope and course of his or her employment for the railroad his or her conduct will be sufficiently connected to interstate commerce to be included within the Act.

6. Counsel should draft a concise statement of the Safety Appliance Act violation alleged which is simple and free of unnecessary language. An example of a concise statement which might be sufficient in a case brought for violation of 49 U.S.C. § 20302(a)(2), formerly 45 U.S.C. § 4 (1988), is as follows: "Third, the grab iron at issue in the evidence was not secure, and . . . ."

The Secretary of Transportation is authorized to establish standards for equipment covered under the Boiler Inspection Act and the Safety Appliance Act. *Shields v. Atlantic Coast Line R. Co.*, 350 U.S. 318, 320-25 (1956); *Lilly v. Grand Trunk Western R. Co.*, 317 U.S. 481, 486 (1943). Regulations promulgated pursuant to this authority are found in Title 49 of the Code of Federal Regulations under the Federal Railroad Administration (FRA) regulations. FRA regulations "acquire the force of law and become an integral part of the Act . . . ." *Lilly*, 317 U.S. at 488. Such regulations have "the same force as though prescribed in terms of the statute," *Atchison, T. & S.F. Ry. Co. v. Scarlett*, 300 U.S. 471, 474 (1937), and violation of such regulations "are violations of the statute, giving rise not only to damage suits by those injured, but also to money penalties recoverable by the United States." *Urie v. Thompson*, 337 U.S. 163, 191 (1949) (citations omitted). If the plaintiff's case is based on a violation of such a regulation, the plaintiff may request the court to replace Paragraph Second of the instruction with a paragraph submitting the regulation violation theory. *See Eckert v. Aliquippa & Southern R. Co.*, 828 F.2d 183, 187 (3d Cir. 1987).

7. Both the Boiler Inspection Act and the Safety Appliance Act require that the equipment at issue be "in use" at the time of the subject incident. The purpose of the "in use" element is to "exclude those injuries directly resulting from the inspection, repair or servicing of railroad equipment located at a maintenance facility." *Angell v. Chesapeake & O. Ry. Co.*, 618 F.2d 260, 262 (4th Cir. 1980); *Steer v. Burlington Northern, Inc.*, 720 F.2d 975, 976-77 (8th Cir. 1983).

Whether the equipment at issue is "in use" at the time of the subject incident is to be decided by the court as a question of law and not by the jury. *Pinkham v. Maine Cent. R. Co.*, 874 F.2d 875, 881 (1st Cir. 1989) (citing *Steer*, 720 F.2d at 977). Because the "in use" element is a question of law for the court, this instruction does not submit the question to the jury.

Numerous reported cases discuss this element of the Boiler Inspection Act and Safety Appliance Act, and cases which construe the term "in use" under one act are authoritative for purposes of construing the term under the other act. *Holfester v. Long Island Railroad Co.*, 360 F.2d 369, 373 (2d Cir. 1966). Any attempt to here represent the cases on point is beyond the scope of these Notes on Use, and counsel are referred to the authorities for further discussion of this element.

8. The standard of "in whole or in part" causation which applies to general F.E.L.A. negligence cases is the standard of causation which applies to F.E.L.A. cases premised upon violation of the Safety Appliance Act. "Once this violation is established, only causal relation is an issue. And Congress has directed liability if the injury resulted 'in whole or in part' from defendant's negligence or its violation of the Safety Appliance Act." *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 434-35 (1949).

The defendant may request an instruction stating that if the plaintiff's negligence was the sole cause of his or her injury, he or she may not recover under the F.E.L.A. *New York Central R. Co. v. Marcone*, 281 U.S. 345, 350 (1930); *Meyers v. Union Pacific R.R. Co.*, 738 F.2d 328, 330-31 (8th Cir. 1984) (not error to instruct jury, "if you find that the plaintiff was guilty of negligence, and that the plaintiff's negligence was the sole cause of his injury, then you must return your verdict in favor of defendant"). Such a defense may also arise under the Boiler Inspection and Safety Appliance Acts. *See Beimert v. Burlington Northern, Inc.*, 726 F.2d 412, 414 (8th Cir. 1984).

Sole cause instructions have sometimes been criticized as unnecessary and as confusing. *See Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 883-84 n.1 (8th Cir. 1980); *Almendarez v. Atchison, T. & S.F. Ry. Co.*, 426 F.2d 1095, 1097 (5th Cir. 1970); *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820, 826-27 (5th Cir. 1965). The Committee takes no position on whether a sole cause instruction should be given in an F.E.L.A. case. If the court decides to give a sole cause type instruction, the following may be appropriate:

> The phrase "in whole or in part" as used in [this instruction] [Instruction ___ (state the title or number of the plaintiff's elements instruction)] means that the railroad is responsible if [describe the alleged Safety Appliance Act violation], if any, played any part, no matter how small, in causing the plaintiff's injuries. This, of course, means that the railroad is not responsible if any other cause, including the plaintiff's own negligence, was solely responsible.*
>
> *This instruction may be given as a paragraph in the plaintiff's elements instruction or as a separate instruction.

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 507 (1957); *Page v. St. Louis Southwestern Ry.*, 349 F.2d 820, 826-27 (5th Cir. 1965).

As is the case with any model instruction, if the court determines that some other instruction on the subject is appropriate, such an instruction may be given.

9. This paragraph should not be used if Model Instruction 7.02A or 7.02B is given.

10. Use Model Instruction 7.02C, *infra*, to submit affirmative defenses.

Committee Comments

The Introduction to Section 7 discusses the relationship among the Boiler Inspection Act (formerly 45 U.S.C. §§ 22-23, recodified 49 U.S.C. §§ 20102, 20701), the Safety Appliance Act (formerly 45 U.S.C. §§ 1-16, recodified 49 U.S.C. §§ 20301-20304, 21302, 21304), and the F.E.L.A., 45 U.S.C. § 51, *et seq*.

Federal Employers' Liability Act (FELA)

7.06A F.E.L.A. DAMAGES - INJURY TO EMPLOYEE

If you find in favor of the plaintiff, then you must award the plaintiff such sum as you find will fairly and justly compensate the plaintiff for any damages you find the plaintiff sustained [and is reasonably certain to sustain in the future][1] as a direct result of the occurrence mentioned in the evidence.[2] [You should consider the following elements of damages:[3]

1. The physical pain and (mental) (emotional) suffering the plaintiff has experienced (and is reasonably certain to experience in the future); the nature and extent of the injury, whether the injury is temporary or permanent (and whether any resulting disability is partial or total), (including any aggravation of a pre-existing condition);

2. The reasonable expense of medical care and supplies reasonably needed by and actually provided to the plaintiff to date (and the present value of reasonably necessary medical care and supplies reasonably certain to be received in the future);

3. The earnings the plaintiff has lost to date (and the present value of earnings the plaintiff is reasonably certain to lose in the future);[4]

4. The reasonable value of household services which the plaintiff has been unable to perform for [(himself) (herself)] to date (and the present value of household services the plaintiff is reasonably certain to be unable to perform for [(himself) (herself)] in the future).][5, 6]

[Remember, throughout your deliberations you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.][7] [You may not include in your award any sum for court costs or attorneys' fees.][8]

[If you assess a percentage of negligence to the plaintiff by reason of Instruction ___ (state the title or number of the contributory negligence instruction),[9] do not diminish the total amount of damages by the percentage of negligence you assess to the plaintiff. The court will do this.][10]

Notes on Use

1. Include this language if the evidence supports a submission of any item of future damage.

2. The language "as a direct result of the occurrence mentioned in the evidence" should be deleted and replaced whenever there is evidence tending to prove that the employee suffered the subject injuries in an occurrence other than the one upon which the railroad's liability is

premised. In such cases, the language "as a result of the occurrence mentioned in the evidence" should be replaced with a concise description of the occurrence upon which the railroad's liability is premised. An example of such a case is one in which the plaintiff alleges that his or her injuries were suffered in a fall at the work place, and the railroad claims the injuries were suffered in a car accident which was not job related. The following would be appropriate language to describe the occurrence upon which liability is premised: "as a direct result of the fall on (the date of the fall)."

3. This list of damages is optional and is intended to include those items of damage for which recovery is commonly sought in the ordinary F.E.L.A. case. This list is not intended to exclude any item of damages which is supported in evidence and the authorities. *If the court elects to list items of damage in the damages instruction, there must, of course, be evidence to support each item listed*.

4. For the relationship between lost future earnings and lost earning capacity, *see Gorniack v. National R. Passenger Corp.*, 889 F.2d 481, 483-84 (3d Cir. 1989); *DeChico v. Metro-North Commuter RR*, 758 F.2d 856, 861 (2d Cir. 1985); *Wiles v. New York, Chicago & St. Louis Railroad Co.*, 283 F.2d 328, 331-32 (3d Cir. 1960); *Downie v. United States Lines Co.*, 359 F.2d 344, 347 (3d Cir. 1966) (if permanent injuries result in impairment of earning capacity, the plaintiff is entitled to reimbursement for such impairment including, but not limited to, probable loss of future earnings). If the court determines that the case is one in which the jury should be instructed on the distinction between loss of future earnings and loss of earning capacity, this model instruction may be modified accordingly. Otherwise, such issue can be left to argument. Situations in which this distinction arises may be rare.

5. The reasonable value of household services which the injured employee is unable to perform for himself or herself is a compensable item of pecuniary damages. *See Cruz v. Hendy Intern. Co.*, 638 F.2d 719, 723 (5th Cir. 1981) (case decided under the Jones Act, 46 U.S.C. § 688 (1982), which specifically incorporates the F.E.L.A. and where it was stated that the plaintiff may recover "the cost of employing someone else to perform those domestic services that he would otherwise have been able to render but is now incapable of doing."); *cf. Hysell v. Iowa Public Service Co.*, 559 F.2d 468, 475 (8th Cir. 1977).

6. If the evidence supports a charge that the plaintiff has failed to mitigate his or her damages, the following paragraph should be included after the last listed item of damage, or after the general damage instruction paragraph if the court chooses not to list items of damage:

> If you find that the defendant has proved by that the plaintiff has failed to take reasonable steps to minimize [(his) (her)] damages, then your award must not include any sum for any amount of damage which you find plaintiff might reasonably have avoided by taking such steps.

In *Kauzlarich v. Atchison, Topeka & Santa Fe Ry. Co.*, 910 S.W.2d 254 (Mo. banc 1995), it was held to be reversible error to refuse to give the railroad's proposed mitigation instruction that "closely follow[ed]" the above instruction. *Id.* at 256. The court held that as a matter of federal substantive law, the railroad was entitled to a mitigation instruction when there was evidence to

support it. *Id.* at 258. The burden of pleading and proving failure to mitigate is on the defendant. *Sayre v. Musicland Group, Inc.*, 850 F.2d 350, 355-56 (8th Cir. 1988); *Modern Leasing v. Falcon Mfg. of California*, 888 F.2d 59, 62 (8th Cir. 1989).

7./8. These instructions may also be added.

9. *See infra* Model Instruction 7.03. Note that contributory negligence may not be submitted for claims alleging violation of the Boiler Inspection Act or Safety Appliance Act.

10. If Model Instruction 7.08, *infra*, Form of Verdict, is used, then this paragraph must be given because contributory negligence is submitted. If the alternative Form of Verdict set out in Committee Comments to 7.08 is used, this paragraph should not be used.

Committee Comments

This Instruction should be used to submit damages issues in cases in which the employee's injuries were not fatal. Model Instruction 7.06B, *infra*, should be used in cases in which the employee's injuries were fatal.

The final paragraph of this instruction tells the jury that the court will diminish the total amount of damages in proportion to the amount of contributory negligence found. This instruction is consistent with the Form of Verdict 7.08 which requires the jury to assess the plaintiff's total damages and the plaintiff's percentage of contributory negligence. If contributory negligence is not submitted, the final paragraph of 7.06A should be eliminated. Also, it should be eliminated for claims submitted under the Boiler Inspection Act and the Safety Appliance Act.

7.06B F.E.L.A. DAMAGES - DEATH OF EMPLOYEE

If you find in favor of the plaintiff, then you must award the plaintiff such sum as you find will fairly and justly compensate [here identify the beneficiaries][1] for [(his) (her) (their)] damages which can be measured in money which you find [(he) (she) (they)] sustained as a direct result of the death of (name of decedent).[2] [You should consider the following elements of damages:[3]

1. The reasonable value of any money, goods and services that (name of decedent) would have provided (name of beneficiaries) had (name of decedent) not died on (date of death). [These damages include the monetary value of (name of child beneficiaries)'s loss of any care, attention, instruction, training, advice and guidance from (name of decedent).][4]
2. Any conscious pain and suffering you find from the evidence that (name of decedent) experienced as a result of [(his) (her)] injuries.[5]
3. The reasonable expense of medical care and supplies reasonably needed by and actually provided to (name of decedent).][5]

Your award must not include any sum for grief or bereavement or the loss of society or companionship.[6]

Any award you make for the value of any money and services which you find from the evidence that (name of decedent) would have provided (name of each beneficiary) in the future should be reduced to present value. Any award you make for the value of any money and services you find from the evidence that (name of decedent) would have provided (name of beneficiary) between the date of [(his) (her)] death on (date of death) and the present should not be reduced to present value.[7]

[Remember, throughout your deliberations you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.][8] [You may not include in your award any sum for court costs or attorneys' fees.][9]

[If you assess a percentage of negligence to (name of decedent) by reason of Instruction ____ (state the number of the contributory negligence instruction),[10] do not diminish the total amount of damages by the percentage of negligence you assess to (name of decedent). The court will do this.][11]

Federal Employers' Liability Act (FELA)

Notes on Use

1. A death action under the F.E.L.A. is brought by a personal representative, as the plaintiff, for the benefit of specific beneficiaries. The personal representative brings the action "for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, ..." 45 U.S.C. § 51 (1939).

2. *See* Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 128.30 (5th ed. 2000). Damages in an F.E.L.A. death action "are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries." *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59, 70 (1913). "No hard and fast rule by which pecuniary damages may in all cases be measured is possible . . . . The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, ..." *Id.*, 227 U.S. at 72; *cf. Norfolk & Western R. Co. v. Holbrook*, 235 U.S. 625, 629 (1915).

3. This list of damages is optional and is intended to include those items of damage for which recovery is commonly sought in the ordinary F.E.L.A. case. This list is not intended to exclude any item of damages which is supported in evidence and the authorities. *If the court elects to list items of damage in the damages instruction, there must, of course, be evidence to support each item listed*.

4. In an F.E.L.A. death case, recovery is limited to pecuniary losses. The items specified in the bracketed sentence have been deemed pecuniary losses in the case of a child beneficiary. The recovery may be different in the case of a spouse, parent or an adult child. *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59, 70 (1913); *Norfolk & Western R. Co. v. Holbrook*, 235 U.S. 625, 629 (1915); *Kozar v. Chesapeake and Ohio Railway Co.*, 449 F.2d 1238, 1243 (6th Cir. 1971).

5. The items of damage set forth in paragraphs 2 and 3 are recoverable by the personal representative on behalf of the spouse, children or parents of the decedent, if supported by the evidence. If the claim is brought by the personal representative on behalf of next of kin other than the spouse, children or parents, then dependency upon decedent must be shown, and the instructions will require modification to submit that issue to the jury. The elements instruction might be modified to submit the dependency issue. 45 U.S.C. § 59 (1910); *Auld v. Terminal R.R. Assoc. of St. Louis*, 463 S.W.2d 297 (Mo. 1970); *Jensen v. Elgin, Joliet & Eastern Ry. Co.*, 24 Ill.2d 383, 182 N.E.2d 211 (1962).

Funeral expenses may not be included in damages awarded in F.E.L.A. actions under either a 45 U.S.C. § 51 death action or a 45 U.S.C. § 59 survival action. *Philadelphia & R.R. v. Marland*, 239 Fed. 1, 11 (3d Cir. 1917); *DuBose v. Kansas City Southern Ry. Co.*, 729 F.2d 1026, 1033 (5th Cir. 1984); *Heffner v. Pennsylvania R.R. Co.*, 81 F.2d 28, 31 (2d Cir. 1936); *Frabutt v. New York C. & St. L. R.R.*, 84 F. Supp. 460, 467 (W.D. Pa. 1949).

6. *Michigan Central R. v. Vreeland*, 227 U.S. 59, 70 (1913).

7. Future pecuniary benefits in an F.E.L.A. death case should be awarded at present value. *Chesapeake & O.R. Co. v. Kelly*, 241 U.S. 485, 489-90 (1916); *cf. St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985).

8./9. These instructions may also be added.

10. Model Instruction 7.03, *infra*, submits the issue of contributory negligence.

11. If Model Instruction 7.08, *infra*, Form of Verdict, is used, then this paragraph must be given when contributory negligence is submitted. If the alternative Form of Verdict set out in Committee Comments to 7.08 is used, this paragraph should not be used.

Committee Comments

This instruction should be used to submit damages in cases in which the employee's injuries were fatal. Model Instruction 7.06A, *infra*, should be used in cases in which the employee's injuries were not fatal.

The final paragraph of this instruction tells the jury that the court will diminish the total amount of damages in proportion to the amount of contributory negligence found. This instruction is consistent with Form of Verdict 7.08 which requires the jury to assess the plaintiff's total damages and decedent's percentage of contributory negligence. If contributory negligence is not submitted the final paragraph of 7.06B should be eliminated. Also, it should be eliminated for claims submitted under the Boiler Inspection Act and the Safety Appliance Act.

Federal Employers' Liability Act (FELA)

7.06C F.E.L.A. DAMAGES - PRESENT VALUE OF FUTURE LOSS

If you find that the plaintiff will sustain (specify damages subject to present value reduction, such as, "lost future earnings" or "future medical expenses"), then you must reduce those future damages to their present value.

The present value of future damages is the amount of money that will fully compensate the plaintiff for future damages, assuming that amount is invested now and will earn a reasonably risk-free rate of interest for the time that will pass until the future damages occur.

You must not reduce to present value any non-economic damages you find that the plaintiff is reasonably certain to sustain in the future, such as for pain and suffering, or mental anguish.[1]

Notes on Use

1. *Crane v. Crest Tankers, Inc.*, 47 F.3d 292, 295 n.5 (8th Cir. 1995).

Committee Comments

In an F.E.L.A. case "an utter failure to instruct the jury that present value is the proper measure of a damage award is error." *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 412 (1985); *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 339-40 (1988). If requested, such an instruction must be given. However, "no single method for determining present value is mandated by federal law." *Dickerson*, 470 U.S. at 412. *See also Beanland v. Chicago, Rock Island & Pacific Railroad*, 480 F.2d 109, 114-15 (8th Cir. 1973); Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 128.20 (5th ed. 2000).

Only future economic damages are to be reduced to present value. Past economic damages and future noneconomic damages are not to be reduced to present value. *See Chesapeake & Ohio R. Co. v. Kelly*, 241 U.S. 485, 489 (1916).

In *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 885 (8th Cir. 1980), the court stated that the jury should not be instructed to reduce damages for future pain and suffering to present value.

This Instruction contemplates that the court will allow evidence and jury argument about the proper method for calculating present value. If additional instruction on the definition of present value or factors to be considered is deemed appropriate, *see*, *e.g.*,*5th Cir. Civ. Jury Instr.* 15.3C (2006); and *Arkansas Model Jury Instructions-AMI Civil 3d*, AMI 2219 (1989).

Federal Employers' Liability Act (FELA)

7.06D F.E.L.A. DAMAGES - INCOME TAX EFFECTS OF AWARD

The plaintiff will not be required to pay any federal or state income taxes on any amount that you award.

[When calculating lost earnings, if any, you should use after-tax earnings.][1]

Notes on Use

1. This sentence should be given if there is evidence of both gross and net earnings and there is any danger that the jury may be confused as to the proper measure of damages.

Committee Comments

If requested, the jury must be instructed that the verdict will not be subject to income taxes. *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 498 (1980); *Gander v. FMC Corp.*, 892 F.2d 1373, 1381 (8th Cir. 1990); *Paquette v. Atlanska-Plovidba*, 701 F.2d 746, 748 (8th Cir. 1983). Furthermore, the Supreme Court in *Norfolk & Western Ry. Co. v. Liepelt*,, stated that the jury should base its award on the "after-tax" value of lost earnings in determining lost earnings. The Court stated:

> The amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of the tax he must pay to the Federal Government. It is his after-tax income, rather than his gross income before taxes, that provides the only realistic measure of ability to support his family.

444 U.S. at 493.

7.08 FORM OF VERDICT - CONTRIBUTORY NEGLIGENCE SUBMITTED

VERDICT[1]

Note: Complete this form by writing in the name required by your verdict.

On the claim[2] of plaintiff [(name of plaintiff)] against defendant [(name of the defendant)], we, the jury find in favor of:

_____

Plaintiff [(name of plaintiff)] or Defendant [(name of the defendant)]

Note: Complete the next paragraph only if the above finding is in favor of the plaintiff.

We, the jury, assess the total damages of plaintiff [(name of plaintiff)] at $_____.

DO NOT REDUCE THIS AMOUNT BY THE PERCENTAGE OF NEGLIGENCE, IF ANY, YOU FIND IN THE NEXT QUESTION.

Note: If you do not assess a percentage of negligence to [plaintiff] [(name of decedent)] under Instruction _____ (state the number or title of the contributory negligence instruction), then write "0" (zero) in the blank in the following paragraph. If you do assess a percentage of negligence to [plaintiff] [(name of decedent)] by reason of Instruction _____ (state the number or title of contributory negligence instruction), then write the percentage of negligence in the blank in the following paragraph. The court will then reduce the total damages you assess above by the percentage of negligence you assess to [plaintiff] [(name of decedent)].

We, the jury, find [plaintiff] [(name of decedent)] to be _____% negligent.

Notes on Use

1. When more than one claim is submitted, a jury decision is required on each claim.

Although the employee may bring claims for negligence as well as claims for violation of the Safety Appliance Act or Boiler Inspection Act in the same case, the employee is entitled to only one recovery for his or her damages.

2. If more than one claim is submitted in the same lawsuit, the claims should be separately identified in the verdict form. *See infra* Model Instruction 4.60.

Federal Employers' Liability Act (FELA)

Committee Comments

This form of verdict can be used in F.E.L.A. negligence cases when contributory negligence is submitted. In F.E.L.A. cases where contributory negligence is not submitted and in Boiler Inspection Act and Safety Appliance Act cases use Form of Verdict 7.08A.

In cases in which the issue of contributory negligence has been submitted to the jury, and the jury has been instructed to make findings on the issues of contributory negligence and `damages, there is a question whether the jury or the court should perform the computations which reduce the total damages by the percentage of contributory negligence found. The plain language of 45 U.S.C. § 53 (1908) is that "the damages shall be diminished *by the jury* . . . ." (Emphasis added.) This Committee is not aware of any case specifically prohibiting a form of verdict which allows the jury to determine the percentage of the plaintiff's negligence and permits the court to perform the mathematical calculation. State jurisdictions such as Arkansas and Missouri, and some federal courts, instruct the jury to reduce the total damage award by the percentage of contributory negligence before rendering a general verdict for the reduced amount of total damages. *Wilson v. Burlington Northern, Inc.*, 670 F.2d 780, 782-83 n.1 (8th Cir. 1982) (jury instructed to perform contributory negligence reduction computation and to return general verdict for damage award in reduced amount); *note* Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil §§ 106.12, 106.13, 106.14 (5th ed. 2000).

Another means to the same result is for the jury to separately set forth the percentage of contributory negligence and the total amount of damages without reduction for contributory negligence. With this information the court will perform the contributory negligence damage reduction calculation in arriving at its judgment. This may be done by means of a special verdict. Fed. R. Civ. P. 49(a); *Wattigney v. Southern Pacific Company*, 411 F.2d 854, 856 (5th Cir. 1969); Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil §§ 106.12, 106.13, 106.14 (5th ed. 2000). This may also be done by means of a general verdict accompanied by special interrogatories. Fed. R. Civ. P. 49(b); *Flanigan v. Burlington Northern Inc.*, 632 F.2d 880, 884 (8th Cir. 1980).

If the court wants the jury to reduce the damages by a monetary amount because of contributory negligence, the following instruction may be used:

VERDICT[1]

Note: Complete this form by writing in the name required by your verdict.

On the claim[2] of plaintiff [(name of plaintiff)] against defendant [(name of the defendant)], we, the jury, find in favor of:

_____

Plaintiff [(name of plaintiff)] Defendant [(name of the defendant)]

Note: Complete the following paragraph only if the above finding is in favor of the plaintiff. [If you assess a percentage of negligence to (name of decedent) (the plaintiff) by reason of Instruction _____ (state the name of the contributory negligence instruction), then you must reduce the total amount of damages by the percentage of negligence you assess to (name of decedent) (plaintiff).]

We, the jury, assess the damages of plaintiff [(name of plaintiff)] at $_____.

By using the recommended Form of Verdict 7.08, the trial court and counsel can determine whether the jury has found the plaintiff to be contributorily negligent, and if so, the percentage of fault attributed to the plaintiff. When a general form of verdict is used, the record will not show what determinations were made on this issue and it also will be impossible to determine the amount of total damages determined by the jury before reduction for any contributory negligence. Furthermore, by using 7.08, a court which reviews the verdict on appeal will be able to determine what the jury decided on these issues, and in certain cases this may avoid the necessity of a retrial. For example, assume that a jury finds for the plaintiff and assesses his or her total damages at $100,000 but finds the plaintiff 50% contributorily negligent. Assume further that on appeal it is held that the defendant failed to make a submissible case on the plaintiff's contributory negligence and that it was error to submit this issue to the jury. If 7.08 were used in this hypothetical case, the appellate court could simply reverse and enter judgment for the plaintiff in the amount of $100,000. *See Dixon v. Penn Central Company*, 481 F.2d 833 (6th Cir. 1973). If, however, a general form of verdict were used, the appellate court would be unable to determine whether the jury had found no negligence on the part of the plaintiff and evaluated his or her damages at $50,000 or found the plaintiff 90% negligent and evaluated his or her damages at $500,000. The appellate court would have no choice but to remand the case for a new trial.

In addition, it is believed that the use of Form of Verdict 7.08 is more likely to produce a jury verdict that is proper and consistent with the court's instructions. 7.08 directs the jury's attention to the proper issues in the proper order, and makes it possible for the court and counsel to confirm that the jury has followed the instructions in this regard.

Federal Employers' Liability Act (FELA)

7.08A FORM OF VERDICT - CONTRIBUTORY NEGLIGENCE NOT SUBMITTED

VERDICT[1]

Note: Complete this form by writing in the name required by your verdict.

On the claim[2] of plaintiff [(name of plaintiff)] against defendant [(name of the defendant)], we, the jury find in favor of:

_____

Plaintiff [(name of plaintiff)] Defendant [(name of the defendant)]

Note: Complete the next paragraph only if the above finding is in favor of the plaintiff.

We, the jury, assess the total damages of plaintiff [(name of plaintiff)] at $_____.

Notes on Use

1. When more than one claim is submitted, a jury decision is required on each claim.

Although the employee may bring claims for negligence as well as claims for violation of the Safety Appliance Act or Boiler Inspection Act in the same case, the employee is entitled to only one recovery for his or her damages.

2. If more than one claim is submitted in the same lawsuit, the claims should be separately identified in the verdict form. *See infra* Model Instruction 4.60.

Committee Comments

This form of verdict should be used in F.E.L.A. negligence cases when contributory negligence is not submitted. Also, it is to be used in Boiler Inspection Act and Safety Appliance Act cases.

Federal Employers' Liability Act (FELA)

7.09 DEFINITION OF TERM "NEGLIGENT" OR "NEGLIGENCE"

The term "negligent" or "negligence" as used in these Instructions means the failure to use that degree of care which an ordinarily careful person would use under the same or similar circumstances. [The degree of care used by an ordinarily careful person depends upon the circumstances which are known or should be known and varies in proportion to the harm that person reasonably should foresee. In deciding whether a person was negligent you must determine what that person knew or should have known and the harm that should reasonably have been foreseen.]

Committee Comments

When the term "negligent" or "negligence" is used, it must be defined. *Note infra* Model Instruction 7.10 (definition of term "ordinary care"); *note also infra* Model Instruction 7.11 (combined definition of terms "ordinary care" and "negligent" or "negligence").

Concerning the bracketed language, in order for the railroad to be found negligent under the F.E.L.A., the jury must find that the railroad either knew or should have known of the condition or circumstance which is alleged to have caused the employee's injury or death. This is referred to as the notice requirement. *See Siegrist v. Delaware, Lackawanna & Western R. Co.*, 263 F.2d 616, 619 (2d Cir. 1959) (referring to the "doctrine of notice"). Closely related to the notice requirement is the "essential ingredient" of reasonable foreseeability of harm. *Gallick v. Baltimore & Ohio Railway Co.*, 372 U.S. 108, 117 (1963). Given the actual or constructive notice of the condition or circumstance alleged to have caused injury, "the defendant's duty is measured by what a reasonably prudent person should or could have reasonably anticipated as occurring under like circumstances." *Davis v. Burlington Northern, Inc.*, 541 F.2d 182, 185 (8th Cir. 1976). Thus, "the ultimate question of fact is whether the railroad exercised reasonable care" and this involves "the question whether the railroad had notice of any danger." *Bridger v. Union Ry, Co.*, 355 F.2d 382, 389 (6th Cir. 1966).

The bracketed language of this instruction instructs the jury on notice and reasonable foreseeability of harm. *See Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67 (1943); *Chicago & North Western Railway Company v. Rieger*, 326 F.2d 329, 335 (8th Cir. 1964); W. Mathes, *Jury Instructions and Forms for Federal Civil Cases*, 28 F.R.D. 401, 495 (1962). The bracketed language may be included even when the defendant instructs on this issue in Model Instruction 7.02B, *infra*.

Federal Employers' Liability Act (FELA)

7.10 DEFINITION OF THE TERM "ORDINARY CARE"

The phrase "ordinary care" as used in these Instructions means that degree of care that an ordinarily careful person would use under the same or similar circumstances. [The degree of care used by an ordinarily careful person depends upon the circumstances which are known or should be known and varies in proportion to the harm that person reasonably should foresee. In deciding whether a person exercised ordinary care you must consider what that person knew or should have known and the harm that should reasonably have been foreseen.]

Committee Comments

When the phrase "ordinary care" is used, it must be defined. *Note infra* Model Instruction 7.09 (definition of term "negligent" or "negligence"); *note also infra* Model Instruction 7.11 (combined definition of terms "ordinary care" and "negligent" or "negligence").

Concerning the bracketed language, in order for the railroad to be found negligent under the F.E.L.A., the jury must find that the railroad either knew or should have known of the condition or circumstance which is alleged to have caused the employee's injury or death. This is referred to as the notice requirement. *See Siegrist v. Delaware, Lackawanna & Western R. Co.*, 263 F.2d 616, 619 (2d Cir. 1959) (referring to the "doctrine of notice"). Closely related to the notice requirement is the "essential ingredient" of reasonable foreseeability of harm. *Gallick v. Baltimore & Ohio Railway Company*, 372 U.S. 108, 117 (1963). Given the actual or constructive notice of the condition or circumstance alleged to have caused injury, "the defendant's duty is measured by what a reasonably prudent person should or could have reasonably anticipated as occurring under like circumstances." *Davis v. Burlington Northern, Inc.*, 541 F.2d 182, 185 (8th Cir. 1976). Thus, "the ultimate question of fact is whether the railroad exercised reasonable care" and this involves "the question whether the railroad had notice of any danger." *Bridger v. Union Railway Company*, 355 F.2d 382, 389 (6th Cir. 1966).

The bracketed language of this instruction instructs the jury on notice and reasonable foreseeability of harm. *See Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67 (1943); *Chicago & North Western Railway Company v. Rieger*, 326 F.2d 329, 335 (8th Cir. 1964); W. Mathes, *Jury Instructions and Forms for Federal Civil Cases*, 28 F.R.D. 401, 495 (1962). The bracketed language may be included even when the defendant instructs on this issue in Model Instruction 7.02B, *infra*.

7.11 DEFINITIONS OF THE TERMS "NEGLIGENT" OR "NEGLIGENCE" AND "ORDINARY CARE" COMBINED

The term "negligent" or "negligence" as used in these Instructions means the failure to use ordinary care. The phrase "ordinary care" means that degree of care that an ordinarily careful person would use under the same or similar circumstances. [The degree of care used by an ordinarily careful person depends upon the circumstances which are known or should be known and varies in proportion to the harm that person reasonably should foresee. In deciding whether a person was negligent or failed to use ordinary care you must consider what that person knew or should have known and the harm that should reasonably have been foreseen.]

Committee Comments

Whenever the term "negligent" or "negligence" or the term "ordinary care" is used in these instructions, it must be defined. When these terms each appear in the same set of instructions, this instruction may be used as an alternative to submitting *infra* Model Instruction 7.09 ("negligent" or "negligence") and Model Instruction 7.10 ("ordinary care") individually.

Concerning the bracketed language, in order for the railroad to be found negligent under the F.E.L.A., the jury must find that the railroad either knew or should have known of the condition or circumstance which is alleged to have caused the employee's injury or death. This is referred to as the notice requirement. *See Siegrist v. Delaware, Lackawanna & Western R. Co.*, 263 F.2d 616, 619 (2d Cir. 1959) (referring to the "doctrine of notice"). Closely related to the notice requirement is the "essential ingredient" of reasonable foreseeability of harm. *Gallick v. Baltimore & Ohio Railway Company*, 372 U.S. 108, 117 (1963). Given the actual or constructive notice of the condition or circumstance alleged to have caused injury, "the defendant's duty is measured by what a reasonably prudent person should or could have reasonably anticipated as occurring under like circumstances." *Davis v. Burlington Northern, Inc.*, 541 F.2d 182, 185 (8th Cir. 1976). Thus, "the ultimate question of fact is whether the railroad exercised reasonable care" and this involves "the question whether the railroad had notice of any danger." *Bridger v. Union Railway Company*, 355 F.2d 382, 389 (6th Cir. 1966).

The bracketed language of this instruction instructs the jury on notice and reasonable foreseeability of harm. *See Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67 (1943); *Chicago & North Western Railway Company v. Rieger*, 326 F.2d 329, 335 (8th Cir. 1964); W. Mathes, *Jury Instructions and Forms for Federal Civil Cases*, 28 F.R.D. 401, 495 (1962). The bracketed language may be included even when the defendant instructs on this issue in Model Instruction 7.02B, *infra*.

8. ADMIRALTY INSTRUCTIONS

Introduction

The territorial bounds of the district courts of the Eighth Circuit include large portions of the Missouri and Mississippi Rivers, the longest inland river system in the United States. On this river system moves most of the inland waterborne commerce in America. The jurisprudence of the Eighth Circuit has generated opinions on many admiralty and maritime disputes and issues. To facilitate the submission of such issues to juries in federal judicial actions, the jury instructions that follow this introduction are submitted.

Admiralty and maritime jury trials occur in actions brought by employees against employers and by invitees against the owners and operators of business premises. There are issues unique and issues common to each type of claim. The rules of decision for such cases may be found in the rich maritime common law precedents of the federal courts and in Congressional legislation.

General Maritime Law

The admiralty and maritime common law of the courts of the United States provides rules of decision for claims brought by non-employee invitees on vessels on navigable waters. *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 814-16 (2001); *The Max Morris*, 137 U.S. 1, 14 (1890); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959). Such claimants may bring a claim for negligence, subject to a reduction of damages (not a complete defense) for comparative negligence or fault. *Kermarec*, 358 U.S. at 629, 630.

> We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case.

Id. at 632. However, admiralty law does not provide a non-employee a claim for unseaworthiness of the subject vessel. *Id.* at 629 and *Smith v. Harbor Towing & Fleeting, Inc.*, 910 F.2d 312 (5th Cir. 1990).

The Supreme Court stated:

> It is settled that the general maritime law imposes duties to avoid unseaworthiness and negligence . . . , that non-fatal injuries caused by the breach of either duty are compensable..., and that death caused by breach of the duty of seaworthiness is also compensable.

Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. at 813. The Supreme Court recognized for the first time in *Garris* a wrongful death claim under general maritime law based upon negligence. *Id.*

More generally, the Supreme Court has held, "when a statute resolves a particular issue, we have held that the general maritime law must comply with that resolution." *Id.* at 817.

Further, "even as to seamen, we have held that general maritime law may provide wrongful-death actions predicated on duties beyond those that the Jones Act imposes." *Id.* at 818.

Suits by Employees

Employee claimants are immediately faced with determining whether to bring suit for compensatory damages under general maritime law, the Jones Act, or to seek workers' compensation under the Longshore and Harbor Workers' Compensation Act (LHWCA) or the applicable state's workers' compensation laws. *Johnson v. Cont'l Grain Co.*, 58 F.3d 1232, 1235 (8th Cir. 1995) (a Jones Act seaman "is excluded from coverage under the LHWCA and vice versa"). A worker covered by the LHWCA may not recover on a theory of unseaworthiness of the vessel. *Id. See also Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 488. 125 S. Ct. 1118, 1124 (2005) ("Thus the Jones Act and the LHWCA are complementary regimes that work in tandem: The Jones Act provides tort remedies to *sea*-based maritime workers, while the LHWCA provides workers' compensation to *land*-based maritime employees.").

The Jones Act

The Jones Act provides**:**

> A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

46 U.S.C. § 30104 (Jan. 28, 2008).

The Jones Act allows only to a seaman a negligence action for either personal injury or wrongful death against the seaman's employer. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995); *Britton v. U.S.S. Great Lakes Fleet, Inc.*, 302 F.3d 812, 816 (8th Cir. 2002) (quoting *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441 (2001)); *Shows v. Harber*, 575 F.2d 1253, 1254 (8th Cir. 1978).

The reference in the Jones Act to laws regulating recovery by railway employees incorporates the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* (FELA), and doctrines of negligence and comparative negligence and abolishes the defense of assumption of the risk. *Scindia Steam Navigation Co. v. DeLos Santos*, 451 U.S. 156, 166 n.13 (1981); *Ballard v. River Fleets, Inc.*, 149 F.3d 829, 831 (8th Cir. 1998); *Miller v. Patton-Tully Transp. Co.*, 851 F.2d 202, 205 (8th Cir. 1988).

The broad scope of Jones Act liability has been described thus:

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the

> slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or in part" to its negligence.

Clark v. Cent. States Dredging Co., 430 F.2d 63, 66 (8th Cir. 1970) (quoting *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 506-07 (1957)); *see also Alholm v. Am. Steamship Co.*, 144 F.3d 1172, 1178 (8th Cir. 1998).

The Jones Act is to be liberally construed "to accomplish its beneficent purposes." *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 790 (1949).

The Fifth Circuit in *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 339 (5th Cir. 1997) (en banc), repudiated its earlier cases to the contrary, and held that under the Jones Act, an employer has the duty to act with ordinary prudence to provide its employees a safe work environment, that is, to act as would a reasonable employer in like circumstances. The court also held that a seaman is obligated under the Jones Act to act with ordinary prudence under similar circumstances to protect himself from the negligence of his employer. 107 F.3d at 339. *See 5th Cir. Civ. Jury Instr.* 4.6 (West 2009).

The issues of actionable negligence and causation under F.E.L.A. recently received some attention. On June 23, 2011, the Supreme Court decided *CSX Transportation, Inc. v. McBride***,** ___U.S. ___, 131 S.Ct. 2630 (2011). The question presented to the Court was whether the Federal Employers' Liability Act requires proof of proximate causation. This is important to Jones Act cases because the Jones Act incorporates the standards of F.E.L.A. in seamen's personal injury suits. 46 U.S.C. § 30104. The F.E.L.A. statutory standard uses the language:

> for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . equipment.

45 U.S.C. § 51.

In *CSX Transportation, Inc.*, the Supreme Court maintained its earlier ruling in *Rogers v. Missouri Pacific R. Co.,* 352 U.S. 500 (1957). Justice Ginsburg, writing for the Court in *CSX*, summarized the Court's holding:

> [W]e conclude that [F.E.L.A.] does not incorporate "proximate cause" standards developed in nonstatutory common-law tort actions. The charge proper in FELA cases, we hold, simply tracks the language Congress employed, informing juries

> that a defendant railroad caused or contributed to a plaintiff employee's injury if the railroad's negligence played any part in bringing about the injury.

Id. at 2634. Also of note in the *CSX* opinion are the statements that it is unnecessary to use the label "proximate cause" when instructing the jury, *id*. at 2636, and that the following language is also appropriate when instructing the jury on causation in a F.E.L.A. case:

> Juries in such cases are properly instructed that a defendant railroad "caused or contributed to" a railroad worker's injury "if [the railroad's] negligence played a part--no matter how small--in bringing about the injury."

Id. at 2636.

Unseaworthiness

The Eighth Circuit described the claim of unseaworthiness:

> "Unseaworthiness is a claim under general maritime law based on the vessel owner's duty to ensure that the vessel is reasonably fit to be at sea." *Lewis*, 531 U.S. at 441 . . . . It is a cause of action distinct from Jones Act negligence, which can be found without a corresponding finding of unseaworthiness.
>
> The warranty of seaworthiness . . . requires that the ship, including the hull, decks, and machinery, "be reasonably fit for the purpose for which they are used." *In re Matter of Hechinger*, 890 F.2d 202, 207 (9th Cir. 1989) (citation omitted). Examples of conditions that can render a vessel unseaworthy include defective gear appurtenances in disrepair, insufficient manpower, unfit crew, and improper methods of loading or stowing cargo. *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 499 (1971) . . . . The burden of proof in demonstrating unseaworthiness rests on the plaintiff, who must show by a preponderance of the evidence that the unseaworthiness was a proximate cause of the injury. *Alvarez v. J. Ray McDermott & Co., Inc.*, 674 F.2d 1037, 1042 n.3 (5th Cir. 1982). Under these circumstances, proximate cause means: "first, that the unseaworthiness . . . played a substantial part in bringing about or actually causing the injury; and two, that the injury was either a direct result of a reasonable probable consequence of the unseaworthiness. . . ." *Id.*

Britton, 302 F.3d at 818.

Seaman

To recover from his or her employer under either the Jones Act or general maritime law, a plaintiff must be a seaman. *McDermott Internat., Inc. v. Wilander*, 498 U.S. 337 (1991). The

Jones Act does not define "seaman." *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005). Whether a worker is a seaman "is usually a fact-intensive inquiry properly left to the jury to resolve." *Johnson v. Cont. Grain Company*, 58 F.3d at 1235. In determining who are and who are not Jones Act seamen, Supreme Court opinions and those of federal courts of appeals have distinguished between maritime workers whose employment is land-based and those whose employment is vessel-based. A "seaman" is an employee whose "duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have a connection to a vessel . . . (or an identifiable group of vessels) that is substantial in terms of both its duration and nature." *Chandris, Inc. v. Latsis*, 515 U.S. at 369; *see also Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554 (1997). Stated another way,

> A finder of fact can conclude that a workman was a member of a crew of a vessel if:
>
> (1) the injured workman performed at least a substantial part of his work on the vessel or was assigned permanently to the vessel; and
>
> (2) the capacity in which the workman was employed and the duties which he performed contributed to the function of the vessel or to accomplishment of its mission.

Miller v. Patton-Tully Transp. Co., 851 F.2d at 204 (quoting *Slatton v. Martin K. Eby Constr. Co.*, 506 F.2d 505, 510 (8th Cir. 1974); *see also Johnson*, 58 F.3d at 1235-36.

A Jones Act "seaman" need not be assigned to a specific vessel; he or she retains "seaman" status if assigned to a group of Jones Act vessels under common ownership or control. *Harbor Tug & Barge Co. v. Papai*, 520 U.S. at 556. Such a fleet of vessels "must take their direction from one identifiable central authority." *Johnson*, 58 F.3d at 1236 (quoting *Reeves v. Mobile Dredging & Pumping Co.*, 26 F.3d 1247, 1258 (2d Cir. 1994)).

In determining whether an employee is a "seaman," a court must look not only to the nature of the activity in which the claimant was injured, but also in the overall nature of the employee's work, whether he or she performs a substantial amount of work on board a "vessel," with regularity and continuity. In *Chandris*, the Supreme Court established a guideline from which courts can vary depending upon the circumstances of the case: "A worker who spends less than about 30 percent of his time in the service of a vessel . . . should not qualify as a seaman under the Jones Act." 515 U.S. at 371.

There is no such guideline, however, for "determining whether an injured worker is substantially connected to a vessel." *Lara v. Harvey's Iowa Mgmt. Co.*, 109 F. Supp.2d 1031, 1034 (S.D. Iowa 2000). An injured worker might be a Jones Act seaman without having worked on board the vessel when it was in transit. *Id.* at 1036. Further, an employer's consideration of an injured worker as a Jones Act "seaman" by the payment of maritime "cure" may be relevant in determining seaman status. *Id.* "[T]he determinative factor is the employee's connection to a vessel, not the employee's particular job." *Johnson*, 58 F.3d at 1236.

Vessel

Admiralty Instructions

An employee-claimant can be a "seaman" under the Jones Act only if he or she is assigned to a vessel. The definition of "vessel" for admiralty and maritime law purposes is contained in 1 U.S.C. § 3:

> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

1 U.S.C. § 3. The Supreme Court construed this definition to require the subject structure to be practicably capable of water transportation. *Stewart v. Dutra Constr. Co.*, 543 U.S. at 496, 125 S. Ct. at 1128 ("The question remains in all cases whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one."). "Simply put, a watercraft is not 'capable of being used' for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement." 543 U.S. at 494, 125 S.Ct. at 1127.

In so construing "vessel," the court rejected the relevance of the "in navigation" factor, established in *Digiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir. 1992) (en banc), in determining whether a watercraft qualifies as a vessel. 543 U.S. at 495, 125 S.Ct. at 1128. Cases applying that factor must now be viewed with great care. *E.g.*, *Tonnesen v. Yonkers Contracting Co.*, 82 F.3d 30, 36 (2d Cir. 1996); *Digiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119, 1123 (1st Cir. 1992 (en banc); *Ellender v. Kiva Constr. Eng'g, Inc.*, 909 F.2d 803, 806 (5th Cir. 1990); *Pavone v. Miss. Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995); *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504, 506 (11th Cir. 1990).

Longshore and Harbor Workers' Compensation Act (LHWCA)

The Supreme Court has described the facets of the LHWCA generally:

> [T]he Longshore and Harbor Workers' Compensation Act (LHWCA) . . . , 33 U.S.C. § 901 et seq., provides nonseaman maritime workers . . . with no-fault workers' compensation claims (against their employer, § 904(b)) and negligence claims (against the vessel, § 905(b)) for injury and death. As to those two defendants, the LHWCA expressly pre-empts all other claims, §§ 905(a), (b) . . . , but it expressly preserves all claims against third parties [(those who neither employed the claimant nor owned the vessel involved in the incident)], §§ 933(a), (i).

Garris, 532 U.S. at 818.

§ 905(b) of LHWCA

Injured maritime workers who are not Jones Act seamen may be able to recover under the LHWCA. Section 905(b) allows a longshoreworker to seek compensation for injuries caused by the negligence, but not the unseaworthiness, of a vessel:[1]

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party in accordance with the provisions of § 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly . . . . The liability of the vessel under the subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. § 905(b).

Section 905(b) does not define the bounds of actionable negligence. *Reed v. ULS Corp.*, 178 F.3d 988, 990-91 (8th Cir. 1999). The Eighth Circuit has recognized that the owner of a vessel owes longshoremen three duties:

> The first, which courts have come to call the "turnover duty," related to the condition of the vessel upon the commencement of stevedoring operations . . . . The second duty, applicable once stevedoring operations have begun, provides that a vessel owner must exercise reasonable care to prevent injuries to longshoremen in areas that remain under the "active control of the vessel." . . . The third duty, called the "duty to intervene," concerns the vessel's obligations with regard to cargo operations in areas under the principal control of the independent stevedore.

Id. at 991 (citing *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92, 98 (1994), and *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. at 167).

However, under the statute such a claim is denied to a longshoreworker who was engaged in repair work. *Johnson v. Cont. Grain Co.*, 58 F.3d at 1237. Section 905(b) also provides in part:

> If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer.

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[1] [1]The definition of "vessel" under the LHWCA should be considered the same as that under the Jones Act. *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 491, 125 S. Ct. 1118, 1125 (2005) ("at the time Congress enacted the Jones Act and the LHWCA in the 1920's, it was settled that § 3 defined the term 'vessel' for purposes of those statutes.").

33 U.S.C. § 905(b).

§ 933 of LHWCA

Under § 933 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 933, a worker or the representative of his or her estate may seek damages for personal injuries against a non-employer, non-vessel-owner, third party. Also, under § 933 an employer has the right to recoup amounts paid under the LHWCA to the employee or the representative of the employee's estate in such a judicial action. *See* 33 U.S.C. § 933.

Wrongful Death

A general maritime cause of action for wrongful death due to unseaworthiness was recognized in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). *See Spiller v. Thomas M. Lowe, Jr.*, 466 F.2d 903, 905 (8th Cir. 1972). The United States Supreme Court has recognized a claim under the general maritime law for the wrongful death of a non-seaman due to negligence. *See Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811.

Punitive Damages

Punitive damages are not recoverable by seamen[2] in personal injury claims under the Jones Act or under general maritime law. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31 (1990) (a seaman's recovery under the Jones Act or general maritime law is limited to pecuniary losses); *Alholm v. Am. Steamship Co.*, 144 F.3d at 1180-81; *Horsley v. Mobile Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994) (applying *Miles* to hold that punitive damages are not recoverable under general maritime law); *Miller v. Am. Present Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir. 1993) (applying *Miles* to hold that punitive damages are not recoverable under the Jones Act).

Maintenance and Cure

General maritime law requires a shipowner to pay an injured seaman maintenance and cure irrespective of any finding of any liability under the Jones Act or general maritime law; this duty arises merely under the employment contract. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938); *Britton*, 302 F.3d at 815; *Wactor v. Spartan Transp. Corp.*, 27 F.3d 347, 351-52 (8th Cir. 1994) (defining “maintenance” and “cure”; failure of seaman to disclose medical

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[2]Some cases have allowed the recovery of punitive damages to non-seamen in maritime cases. *In re Horizon Cruises Litigation*, 2000 WL 685365 (S.D.N.Y. 2000) (acknowledges split among courts); *contra In re Diamond B Marine Services, Inc.*, 2000 WL 222847 (E.D. La. 2000); *O'Hara v. Celebrity Cruises*, 979 F. Supp. 254 (S.D.N.Y. 1997).

information before employment may be a defense to maintenance and cure); *Stanislawski v. Upper River Servs., Inc.*, 6 F.3d 537, 540 (8th Cir. 1993).

A seaman's entitlement to maintenance and cure is independent of entitlement to damages for negligence under the Jones Act. *Britton*, 302 F.3d at 816. The recovery of compensatory damages, however, cannot duplicate moneys already recovered as maintenance and cure. *Stanislawski*, 6 F.3d at 540. Maintenance is an amount sufficient to provide the sick or injured seaman with food and lodging comparable to that he or she would have received on his or her vessel. *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943, 946 (9th Cir. 1986). Cure is reasonable medical treatment and services needed during the seaman's recovery. *Calmar S.S. Corp. v. Taylor*, 303 U.S. at 528.

Maintenance and cure might not be available, if the seaman was required to provide preemployment medical information and failed to do so or concealed material facts regarding the part of the plaintiff's body allegedly injured. *Britton*, 302 F.3d at 816; *Wactor*, 27 F.3d at 352. Before maintenance and cure is denied, "the employer must show that the nondisclosed medical information was material to its decision to hire." *Britton*, 302 F.3d at 816. Maintenance and cure also may be denied if the seaman personally did not incur actual expenses for food and lodging. *Hall v. Noble Drilling (U.S.) Inc.*, 242 F.3d 582, 588 (5th Cir. 2001).

Mitigation of Damages

An injured seaman or other maritime worker must mitigate his or her damages by obtaining reasonable medical treatment. *See Hagerty v. L & L Marine Serv., Inc.*, 788 F.2d 315, 319 (5th Cir. 1986); *Young v. Am. Export Isbrandtsen Lines, Inc.*, 291 F. Supp. 447, 450 (S.D. N.Y. 1968).

Comparative Fault and the Settling Defendant(s)

The Fifth Circuit in *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 339 (5th Cir. 1997) (en banc), repudiated its earlier cases to the contrary, and held that under the Jones Act an employer has the duty to act with ordinary prudence to provide its employees a safe work environment, that is, to act as would a reasonable employer in like circumstances. The court also held that a seaman is obligated under the Jones Act to act with ordinary prudence under similar circumstances to protect himself from the negligence of his employer. 107 F.3d at 339. *See 5th Cir. Civ. Jury Instr.* 4.6 (West 2009).

In an admiralty action, when a plaintiff settles with one of several joint tortfeasors, a nonsettling tortfeasor is responsible to the injured party for the nonsettling tortfeasor's proportionate share of the fault or responsibility in causing the injury. *McDermott, Inc. v. AmClyde & River Don Castings, Ltd.*, 511 U.S. 202, 208-09 (1994). *See infra* Special Interrogatories, § 8.90.

8.10 NEGLIGENCE CLAIM UNDER THE JONES ACT

The law provides a remedy to any seaman who suffers personal injury in the course of [(his) (her)] employment due to the negligence of [(his) (her)] employer. The plaintiff has brought a personal injury claim in this action under the Jones Act.

The Jones Act, however, does not make the employer the accident insurer of the seaman. Negligence on the part of the employer is necessary to recover under the Act.

Committee Comments

The Fifth Circuit in *Gautreaux v. Scurlock Marine, Inc*., 107 F.3d 331, 339 (5th Cir. 1997) (en banc), repudiated its earlier cases to the contrary, and held that under the Jones Act an employer has the duty to act with ordinary prudence to provide its employees a safe work environment, that is, to act as would a reasonable employer in like circumstances. The court also held that a seaman is obligated under the Jones Act to act with ordinary prudence under similar circumstances to protect himself from the negligence of his employer. 107 F.3d at 339. *See 5th Cir. Civ. Jury Instr*. 4.6 (West 2009).

8.10A NEGLIGENCE CLAIM UNDER THE JONES ACT--ELEMENTS

Your verdict must be for the plaintiff [and against the defendant][1] on the plaintiff's Jones Act claim if all the following elements have been proved[2]:

First, the plaintiff was employed by the defendant as a seaman on a vessel[3];

Second, during the course of the plaintiff's employment as a seaman, the defendant [here describe the submitted act or omission]; and

Third, the defendant in any one or more of the respects submitted in paragraph Second was negligent; and

Fourth, such negligence played any part in causing injury to the plaintiff.

Notes on Use

1. Use this phrase if there is more than one defendant.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. *See infra* Model Instructions 8.15-8.16 (defining "seaman on a vessel").

Committee Comments

See Shows v. Harber, 575 F.2d 1253, 1254 (8th Cir. 1978); *Petty v. Dakota Barge Serv.*, 730 F. Supp. 983, 985 (D. Minn. 1989).

The Fifth Circuit in *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 339 (5th Cir. 1997) (en banc), repudiated its earlier cases to the contrary, and held that under the Jones Act an employer has the duty to act with ordinary prudence to provide its employees a safe work environment, that is, to act as would a reasonable employer in like circumstances. The court also held that a seaman is obligated under the Jones Act to act with ordinary prudence under similar circumstances to protect himself from the negligence of his employer. 107 F.3d at 339. *See 5th Cir. Civ. Jury Instr.* 4.6 (West 2009).

Admiralty Instructions

The issues of actionable negligence and causation under F.E.L.A. recently received some attention. On June 23, 2011, the Supreme Court decided *CSX Transportation, Inc. v. McBride*, , --- U.S. ---, 131 S.Ct. 2630 (2011). The question presented to the Court was whether the Federal Employers' Liability Act requires proof of proximate causation. This is important to Jones Act cases because the Jones Act incorporates F.E.L.A. standards in seamen's personal injury suits. 46 U.S.C. § 30104. The F.E.L.A. statutory standard uses the language:

> for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . equipment.

45 U.S.C. § 51.

In *CSX,* the Supreme Court maintained its earlier ruling in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957). Justice Ginsburg, writing for the Court in *CSX*, summarized the Court's holding:

> [W]e conclude that [F.E.L.A.] does not incorporate "proximate cause" standards developed in nonstatutory common-law tort actions. The charge proper in FELA cases, we hold, simply tracks the language Congress employed, informing juries that a defendant railroad caused or contributed to a plaintiff employee's injury if the railroad's negligence played any part in bringing about the injury.

Id. at 2634. Also of note in the *CSX* opinion are the statements that it is unnecessary to use the label "proximate cause" when instructing the jury, *id.* at 2636, and that the following language is also appropriate when instructing the jury on causation in a F.E.L.A. case:

> Juries in such cases are properly instructed that a defendant railroad "caused or contributed to" a railroad worker's injury "if [the railroad's] negligence played a part--no matter how small--in bringing about the injury.

Id. at 2636.

Admiralty Instructions

8.11 JONES ACT--"COURSE OF EMPLOYMENT" DEFINED

Under the Jones Act a seaman is injured in the course of [(his) (her)] employment when, at the time of injury, [(he) (she)] was doing the work of [(his) (her)] employer, that is, [(he) (she)] was working in the service of the vessel as a member of her crew.

Committee Comments

See 11th Cir. Civ. Jury Instr. 6.1 (West 2005).

8.12 JONES ACT--"NEGLIGENCE" DEFINED

The terms "negligent" and "negligence," as used in these instructions, mean the failure to use that degree of care that a reasonably careful person would use under the same or similar circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under the same or similar circumstances, or in failing to do something that a reasonably careful person would do under the same or similar circumstances.

Committee Comments

See Model Instruction 7.09; *9th Cir. Civ. Jury Instr.* 7.3 (West 2007).

The Fifth Circuit in *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 339 (5th Cir. 1997) (en banc), repudiated its earlier cases to the contrary, and held that under the Jones Act an employer has the duty to act with ordinary prudence to provide its employees a safe work environment, that is, to act as would a reasonable employer in like circumstances. The court also held that a seaman is obligated under the Jones Act to act with ordinary prudence under similar circumstances to protect himself from the negligence of his employer. 107 F.3d at 339. *See 5th Cir. Civ. Jury Instr.* 4.6 (West 2009).

8.13 JONES ACT--CAUSATION

If you find from the evidence in the case that the defendant was negligent, then you must decide whether that negligence played any part in causing any injury or damages suffered by the plaintiff. Negligence may cause damage or injury, even if it operates in combination with the act of another or some natural cause, as long as the negligence played any part in causing the damage or injury.

[This standard is different from the causation required for a claim of unseaworthiness of a vessel. An unseaworthy condition of a vessel caused damage or injury if that unseaworthy condition played a substantial part in bringing about the injury or damage, the injury or damage was either a direct result of or a reasonably probable consequence of the condition, and except for the unseaworthy condition of the vessel the injury or damage would not have occurred. Unseaworthiness may be a cause of damage or injury, even though it operates in combination with the act of another or some natural cause, as long as the unseaworthiness contributes substantially to producing the damage or injury.][1]

Notes on Use

1. Use the bracketed paragraph, if a claim for unseaworthiness is submitted to the jury along with a Jones Act claim.

Committee Comments

See Introduction to 7 and Model Instruction 7.01 n.9 (causation under F.E.L.A.);*9th Cir. Civ. Jury Instr.* 7.4 and 7.7 (West 2007);*11th Cir. Civ. Jury Instr.* 1.12 (West 2005). *See also Alholm v. Am. Steamship Co.*, 144 F.3d 1172, 1180-81 (8th Cir. 1998).

The issues of actionable negligence and causation under F.E.L.A. recently received some attention. On June 23, 2011, the Supreme Court decided *CSX Transportation, Inc. v. McBride*, --- U.S. ---, 131 S.Ct. 2630 (2011). The question presented to the Court was whether the Federal Employers' Liability Act requires proof of proximate causation. This is important to Jones Act cases because the Jones Act

incorporates F.E.L.A. standards in seamen's personal injury suits. 46 U.S.C. § 30104. The F.E.L.A. statutory standard uses the language:

> for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . equipment.

45 U.S.C. § 51.

In *CSX,* the Supreme Court maintained its earlier ruling in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957). Justice Ginsburg, writing for the Court in *CSX*, summarized the Court's holding:

> [W]e conclude that [F.E.L.A.] does not incorporate "proximate cause" standards developed in nonstatutory common-law tort actions. The charge proper in FELA cases, we hold, simply tracks the language Congress employed, informing juries that a defendant railroad caused or contributed to a plaintiff employee's injury if the railroad's negligence played any part in bringing about the injury.

Id. at 2634. Also of note in the *CSX* opinion are the statements that it is unnecessary to use the label "proximate cause" when instructing the jury, *id.* at 2636, and that the following language is also appropriate when instructing the jury on causation in a F.E.L.A. case:

> Juries in such cases are properly instructed that a defendant railroad "caused or contributed to" a railroad worker's injury "if [the railroad's] negligence played a part--no matter how small--in bringing about the injury.

Id. at 2636.

8.14 JONES ACT--CONTRIBUTORY NEGLIGENCE (COMPARATIVE FAULT)

A seaman has a duty to use the care that a reasonably careful seaman would use under the same or similar circumstances.

If you find in favor of the [name of plaintiff] under Instruction No. ___ (here insert the number of the plaintiff's elements instruction or verdict director), you must consider whether [(name of plaintiff) or (name of plaintiff's decedent)] was also negligent. Under this instruction, on the plaintiff's (here identify the claim to which this instruction applies) claim, you must assess to [name of plaintiff] a percentage of the total negligence, if all the following elements have been proved[1]:

First,[(name of plaintiff) or (name of plaintiff's decedent)] (describe the negligent conduct); and

Second,[(name of plaintiff) or (name of decedent)] was thereby negligent; and

Third, this negligence of[(name of plaintiff) or (name of plaintiff's decedent)] played a part in causing [(his) (her)] own injury or damage.

The total percentages of the negligence of [(name of plaintiff) or (name of plaintiff's decedent)] and of the defendant for causing [(the plaintiff's) or (decedent's)] injury must equal 100 percent.

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

Committee Comments

See Model Instruction 7.03 (regarding FELA claims);*9th Cir. Civ. Jury Instr.* 7.9 (West 2007). *See also Ballard v. River Fleets, Inc.*, 149 F.3d 829, 831-32 (8th Cir. 1998); *Alholm v. Am. Steamship Co.*, 144 F.3d 1172, 1179 (8th Cir. 1998).

The Fifth Circuit in *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 339 (5th Cir. 1997) (en banc), repudiated its earlier cases to the contrary, and held that under the

Jones Act an employer has the duty to act with ordinary prudence to provide its employees a safe work environment, that is, to act as would a reasonable employer in like circumstances. The court also held that a seaman is obligated under the Jones Act to act with ordinary prudence under similar circumstances to protect himself from the negligence of his employer. 107 F.3d at 339. *See 5th Cir. Civ. Jury Instr.* 4.6 (West 2009).

The issues of actionable negligence and causation under F.E.L.A. recently received some attention. On June 23, 2011, the Supreme Court decided *CSX Transportation, Inc. v. McBride*, --- U.S. ---, 131 S.Ct. 2630 (2011). The question presented to the Court was whether the Federal Employers' Liability Act requires proof of proximate causation. This is important to Jones Act cases because the Jones Act incorporates the standards of F.E.L.A. in seamen's personal injury suits. 46 U.S.C. § 30104. The F.E.L.A. statutory standard uses the language:

> for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . equipment.

45 U.S.C. § 51.

In *CSX*, the Supreme Court maintained its earlier ruling in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957). Justice Ginsburg, writing for the Court in *CSX*, summarized the Court's holding:

> [W]e conclude that [F.E.L.A.] does not incorporate "proximate cause" standards developed in nonstatutory common-law tort actions. The charge proper in FELA cases, we hold, simply tracks the language Congress employed, informing juries that a defendant railroad caused or contributed to a plaintiff employee's injury if the railroad's negligence played any part in bringing about the injury.

Id. at 2634. Also of note in the *CSX* opinion are the statements that it is unnecessary to use the label "proximate cause" when instructing the jury, *id.* at 2636, and that the following language is also appropriate when instructing the jury on causation in a F.E.L.A. case:

> Juries in such cases are properly instructed that a defendant railroad "caused or contributed to" a railroad worker's injury "if [the railroad's]

> negligence played a part--no matter how small--in bringing about the injury.

Id. at 2636.

8.15 "SEAMAN" DEFINED

A "seaman" is a [(sea) or (river) or (lake)][1]-based maritime employee whose work regularly exposes [(him) (her)] to the special hazards and disadvantages to which they who go down to the [(sea) or (rivers) or (lakes)][2] in ships are subjected. The term "seaman" does not include a land-based worker who has only a temporary connection to a vessel, and therefore whose employment does not regularly expose [(him) (her)] to the perils of the [(sea) or (river) or (lake)].[3] Rather, a "seaman" is a member of a crew of a vessel.

You must find that the plaintiff was a "seaman," if it has been proved[4] that at the time of the incident for which the plaintiff is claiming [(he) (she)] was injured:

First, the plaintiff had an employment-related connection to a vessel [or to an identifiable group of such vessels][5] that was substantial in terms of both its duration (in that it occupied at least 30 percent of the plaintiff's work time) and nature; and

Second, the plaintiff's work duties contributed to [(the function of the vessel) or (the function of an identifiable group of vessels)[6] or (the accomplishment of (its) or (their))][7] mission)].

Notes on Use

1. Although the case law refers to "sea" to include all types of navigable water, to avoid jury confusion the term best describing the navigable water at issue in the case should be used in this instruction.

2. *See* footnote 1 above.

3. *See* footnote 1 above.

4. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

5. Include the "identifiable group" language of the definition only if the evidence supports such an instruction.

6. *See* footnote 5 above.

7. The word "their" should be used, if the jury is instructed on an identifiable group of vessels. *See* footnote 5 above.

Committee Comments

See supra Introduction at 5; *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554 (1997); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368-72 (1995); *Roth v. U.S.S. Great Lakes Fleet, Inc.*, 25 F.3d 707, 708-09 (8th Cir. 1994); *Miller v. Patton-Tully Transp. Co., Inc.*, 851 F.2d 202, 204 (8th Cir. 1988); *Slatton v. Martin K. Eby Constr. Co.*, 506 F.2d 505, 510 (8th Cir. 1974); *Offshore Co. v. Robison*, 266 F.2d 769, 775 (5th Cir. 1959). *See also Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005).

Admiralty Instructions

8.16 JONES ACT--"VESSEL" DEFINED

For claims under the Jones Act, the term "vessel" means any structure that is practically capable of transporting persons or property on navigable waters.

Committee Comments

See 1 U.S.C. § 3; Introduction, Vessel, above. The definition of "vessel" for claims under the Jones Act and for claims under the Longshore and Harbor Workers' Compensation Act relates to whether the plaintiff is a seaman and to whether one or the other of these statutes applies. Seaman status depends upon the nature of the work performed by the plaintiff at the time of the alleged incident. In this respect, the scope of the term "vessel" under the Longshore and Harbor Workers' Compensation Act is the same as that under the Jones Act. *See Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005).

Admiralty Instructions

8.20 UNSEAWORTHINESS CLAIM AGAINST EMPLOYER

Under maritime law, every shipowner or operator owes to every seaman employed aboard the vessel the non-delegable duty to keep and maintain the vessel, and all decks and passageways, appliances, gear, tools, and equipment of the vessel, in a seaworthy condition at all times.

To be in a "seaworthy condition" means to be in a condition reasonably suitable and fit to be used for the purpose or the use for which the vessel was provided or intended. An unseaworthy condition may result from the lack of an adequate crew, the lack of adequate manpower to perform a particular task on the vessel, or the improper use of otherwise seaworthy equipment.

Liability for an unseaworthy condition does not in any way depend upon negligence or fault or blame. That is to say, the shipowner-operator is liable for all injuries and damages substantially caused by an unseaworthy condition existing at any time, even though the owner or operator may have exercised due care under the circumstances, and may have had no notice or knowledge of the unseaworthy condition which substantially caused the injury or damage.

However, a shipowner is not required to furnish an accident-free vessel. A vessel is not required to have the best equipment or the finest crew, but only equipment which is reasonably fit for its intended purpose and a crew which is reasonably adequate and competent.

Committee Comments

See Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550 (1960); *5th Cir. Civ. Jury Instr.* 4.11 (West 2009); *9th Cir. Civ. Jury Instr.* 7.11 (West 2007).

8.21 UNSEAWORTHINESS CLAIM AGAINST EMPLOYER--ELEMENTS

Your verdict must for the plaintiff [and against defendant (name of the defendant)][1] on the plaintiff's claim of unseaworthiness, if all the following elements have been proved[2]:

First, the plaintiff was employed by the defendant as a seaman on a vessel[3] at the time [(he) (she)] suffered injury; and

Second, the vessel on which the plaintiff was injured was [(owned) (operated)] by [(his) (her)] employer; and

Third, the defendant's vessel was [_____];[4] and

Fourth, the defendant's vessel was thereby rendered unseaworthy; and

Fifth, the unseaworthy condition of the vessel was a substantial factor in causing the injury or damage to the plaintiff.

Notes on Use

1. Use this phrase if there is more than one defendant.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. *See* Model Jury Instructions, §§ 8.15-8.17 (defining "seaman on a vessel").

4. Here state the submitted condition of the vessel.

Committee Comments

See Model Instruction 7.0; *5th Cir. Civ. Jury Instr.* 4.5 (West 2009); *9th Cir. Civ. Jury Instr.* 7.11 (West 2007); *11th Cir. Civ. Jury Instr.* 6.1 (West 2005).

8.22 UNSEAWORTHINESS CLAIM–CAUSATION

An unseaworthy condition of a vessel caused damage or injury, if:

(a) it played a substantial part in bringing about the injury or damage,

(b) the injury or damage was either a direct result of or a reasonably probable consequence of the condition, and

(c) the injury or damage would not have occurred except for the unseaworthy condition of the vessel.

Unseaworthiness may be a cause of damage or injury, even though it operates in combination with the act of another or some natural cause, as long as the unseaworthiness contributes substantially to producing the damage or injury.

[This standard is different from the causation required for a claim under the Jones Act. Under a Jones Act claim, if you find that the defendant was negligent, then you must decide whether this negligence played any part in causing the injury or damages suffered by the plaintiff.][1]

Notes on Use

1. Use the bracketed paragraph, if a claim under the Jones Act is submitted to the jury along with an unseaworthiness claim.

Committee Comments

See Model Instructions 7.0 and 7.01 n.9 (causation under FELA) (2007);*9th Cir. Civ. Jury Instr.* 7.4 and 7.7 (West 2007); *11th Cir. Civ. Jury Instr.* 6.1 (West 2005). *See also Britton v. U.S.S. Great Lakes Fleet,* Inc., 302 F.3d 812, 818 (8th Cir. 2002); *Alholm v. Am. Steamship Co.*, 144 F.3d 1172, 1180-81 (8th Cir. 1998).

The issues of actionable negligence and causation under F.E.L.A. recently received some attention. On June 23, 2011, the Supreme Court decided *CSX Transportation, Inc. v. McBride*,___ U.S. ___, 131 S.Ct. 2630 (2011). The question presented to the Court was whether the Federal Employers' Liability Act requires proof of proximate causation. This is important to Jones Act cases because the Jones Act incorporates the standards of F.E.L.A. in seamen's personal injury suits. 46 U.S.C. § 30104. The F.E.L.A. statutory standard uses the language**:**

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45 U.S.C. § 51.

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> [W]e conclude that [F.E.L.A.] does not incorporate "proximate cause" standards developed in nonstatutory common-law tort actions. The charge proper in FELA cases, we hold, simply tracks the language Congress employed, informing juries that a defendant railroad caused or contributed to a plaintiff employee's injury if the railroad's negligence played any part in bringing about the injury.

Id. at 2634. Also of note in the *CSX* opinion are the statements that it is unnecessary to use the label "proximate cause" when instructing the jury, *id*. at 2636, and that the following language is also appropriate when instructing the jury on causation in a F.E.L.A. case:

> Juries in such cases are properly instructed that a defendant railroad "caused or contributed to" a railroad worker's injury "if [the railroad's] negligence played a part--no matter how small--in bringing about the injury.

Id. at 2636.

8.30 LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT § 905(b)--TURN-OVER CLAIM--NEGLIGENCE STANDARD

[Name of defendant][1] does not owe the plaintiff the duty to provide a seaworthy vessel; [name of the defendant] is liable only if [(he) (she) (it)] was negligent and that negligence was the proximate cause of the [name of plaintiff's] injury.

Negligence is the failure to exercise reasonable care under the circumstances. A vessel operator such as defendant [name of the defendant] must exercise reasonable care before the plaintiff's employer began the defendant's operations on the vessel. This means that defendant [name of the defendant] must use reasonable care to have the vessel and its equipment in such condition that an expert and experienced [here, insert the type of maritime employment in which the plaintiff's employer was engaged on the vessel] would be able, by the exercise of reasonable care, to carry on its [his] [her] work on the vessel with reasonable safety to persons and property.

[Name of the defendant] must warn the plaintiff's employer of a hazard on the vessel, or a hazard with respect to the vessel's equipment, if**:**

(1) [name of the defendant] knew about the hazard, or should have discovered it in the exercise of reasonable care, and

(2) the hazard was one which was likely to be encountered by the plaintiff's employer in the course of its operations in connection with the defendant's vessel, and

(3) the hazard was one which the plaintiff's employer did not know about, and which would not be obvious to or anticipated by a reasonably competent [here, insert the type of maritime employment in which the plaintiff's employer was engaged on the vessel] in the performance of its [his] [her] work.

Admiralty Instructions

[Even if the hazard was one about which the plaintiff's employer (stevedore) knew, or which would be obvious or anticipated by a reasonably competent [here, insert the type of maritime employment in which the plaintiff's employer was engaged on the vessel], defendant [name of the defendant] must exercise reasonable care to avoid the harm to the plaintiff if the hazard was one which the defendant knew or should have known the plaintiff's employer (stevedore) would not or could not correct and the plaintiff could not or would not avoid.][2]

Notes on Use

1. If there are two or more defendants in the lawsuit, include this phrase and identify the defendant against whom the claim covered by this elements instruction is made.

2. The Committee believes that the factual circumstances would be infrequent which would warrant this instruction.

Committee Comments

This instruction pertains to a claim that the defendant breached its "turn-over" duty. *See Reed v. ULS Corp.*, 178 F.3d 988, 990-91 (8th Cir. 1999). It should only be used where the vessel owner is not the plaintiff's employer (stevedore). Where the vessel owner is also the plaintiff's employer (stevedore), an instruction should be given consistent with *Morehead v. Atkinson-Kiewit*, J/V, 97 F.3d 603, 609, 613 (1st Cir. 1996) (en banc).

The standard of care which a vessel operator owes to the plaintiff after the plaintiff's employer began the operations on the vessel is not the subject of this instruction. Such is different from the standard of care owed before the operations began.

See Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 170-72 (1981)**;** *Reed v. ULS Corp.*, 178 F.3d 988, 991 (8th Cir. 1999).

8.31 LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT § 905(b)--TURN-OVER CLAIM--ELEMENTS OF CLAIM

Your verdict must be for the plaintiff [and against defendant (name of the defendant)][1] [on the plaintiff's claim (describe claim)][2] if all of the following elements have been proved[3]:

First, the plaintiff was engaged in maritime employment and was injured at [(a place within the coverage of the Longshore and Harbor Worker's Compensation Act)[4]][5]; and

Second,[6] defendant (name of the defendant) had the defendant's vessel and equipment in such condition that an expert and experienced maritime worker would not be able, by the exercise of reasonable care, to carry on [(his) (her)] work on the vessel with reasonable safety [in that (describe the conditions and inadequacies at issue)]; and

Third, defendant [(name of the defendant)] in any one or more of the ways described in Paragraph (Second)[7] was negligent[8]; and[9]

Fourth, such negligence was the cause of [(injury to the plaintiff) or (the death of (name of decedent))].

If any of the above elements has not been proved, then your verdict must be for defendant [(name of the defendant)].[10]

Notes on Use

1. Use this phrase if there is more than one defendant.

2. Include this phrase and identify the claim covered by this elements instruction, if more than one claim is to be submitted.

3. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

4. Identify the location of the injury supported by the evidence.

5. This paragraph must be used in those cases where the plaintiff's status as a worker covered by § 905(b) of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 905(b), is at issue. The plaintiff's status as a worker covered by § 905(b) has two components--maritime employment and place of injury. *See* Introduction. The jury must be instructed with

respect to each component of the plaintiff's status that is at issue. If the maritime employment segment is included in this instruction, an explanatory instruction on maritime employment must also be given. *See* Model Instruction 8.32. Similarly, if the place of injury segment is included in this instruction, an explanatory instruction on place of employment must also be given. *See* Model Instruction 8.33.

6. If the instruction with respect to the plaintiff's status as a worker covered by § 905(b) is omitted, the paragraph numbers should accordingly be modified and this should read "*First*."

7. Use the appropriate paragraph number corresponding to the paragraph number describing the claimed deficiencies to the defendants' vessel or equipment.

8. The terms "negligent" and "negligence" must be defined. *See* Model Instruction 8.12.

9. If only one phrase describing the defendant's breach of duty is submitted in Paragraph Second, then Paragraph Third should read as follows:

Third, defendant [(name of the defendant)] was thereby negligent, and

10. This paragraph should not be used if the jury is given a specific instruction on the defendant's theory of the case.

8.32 "MARITIME EMPLOYMENT" DEFINED

A person is engaged in maritime employment if at the time of [(his) (her)] injury, the person is either

(1) injured while engaged in an essential part of the loading or unloading process of a vessel[1]; or

(2) on actual navigable waters in the course of that person's employment on those waters; or

(3) working as a harbor worker, including a ship repairman, shipbuilder, or shipbreaker.

Notes on Use

1. When supported by the evidence, the court may be required to instruct the jury that certain workers who meet the general definition of "employee" under the Longshore and Harbor Workers' Compensation Act have been explicitly excluded from coverage by 33 U.S.C. § 902(3)(A)-(H). Section 902(3) and 33 U.S.C. § 902(4) provide:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include–
>
> (A) individuals employed exclusively to perform office, clerical, secretarial, security, or data processing work;
>
> (B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
>
> (C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);
>
> (D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;
>
> (E) aquaculture workers;
>
> (F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;
>
> (G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. §§ 902(3), 902(4).

Committee Comments

This instruction must be given if the issue of maritime employment is submitted to the jury in Paragraph *First* of the general negligence instruction, Model Instruction 8.10 above.

See 5th Cir. Civ. Jury Instr. 4.13 (West 2006).

8.33 LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT "COVERED PLACE OF INJURY" DEFINED

A person is injured at a place within the coverage of the Longshore and Harbor Workers' Compensation Act if the injury occurred**:**

(a) on navigable waters, or

(b) in an area adjoining navigable waters, or

(c) in an area that is close to but not necessarily touching an area adjoining navigable waters and that is customarily used by an employer in the loading, unloading, building, or repairing of a vessel.

Committee Comments

This instruction must be given if the issue of the place of injury is submitted to the jury in Paragraph *First* of the General Negligence Instruction, Model Instruction 8.31.

See 33 U.S.C. § 903(a);*5th Cir. Civ. Jury Instr.* 4.13 (West 2009). An additional instruction may be needed, if there is an issue over whether the plaintiff is excluded from coverage under 33 U.S.C. § 902(3). *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

Admiralty Instructions

8.34 "NAVIGABLE WATERS" DEFINED

The term "navigable waters" as used in these instructions means a body of water which in its ordinary condition [is] [at the time of plaintiff's injury was] capable of serving as a highway for commerce over which trade and travel are, or may be, conducted in the customary modes of trade and travel on water.

Committee Comments

See The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870); *Three Buoys Houseboat Vacations, U.S.A. Ltd. v. Morts*, 921 F.2d 775, 778-79 (8th Cir. 1990); *Livingston v. United States*, 627 F.2d 165, 168-69 (8th Cir. 1980).

This instruction must be given if the issue of whether the place of injury was on navigable waters is submitted to the jury in Paragraph *First* of the General Negligence Instruction, Model Instruction 8.10.

8.35 [DELETED]

8.40 GENERAL MARITIME LAW--NONEMPLOYEE-INVITEE'S NEGLIGENCE CLAIM--ELEMENTS

Your verdict must be for the plaintiff [and against defendant (name of the defendant)],[1] if all the following elements have been proved[2]:

First, the plaintiff was lawfully aboard the vessel; and

Second, while the plaintiff was lawfully aboard the vessel, the defendant [here describe the act or omission]; and

Third, the defendant [in any one or more of the respects submitted in paragraph Second was negligent][3] [was thereby negligent]; and

Fourth, this negligence of defendant caused plaintiff injury.

Notes on Use

1. Use this phrase if there is more than one defendant.

2. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

3. Define "negligence" under the ordinary reasonable care standard. *See supra* Model Instructions 7.09-7.11 without the bracketed language. *See also Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959).

Committee Comments

See Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959).

8.41 GENERAL MARITIME LAW--NONEMPLOYEE-INVITEE'S CLAIM--CONTRIBUTORY NEGLIGENCE (COMPARATIVE FAULT)

If you find in favor of the plaintiff under Instruction No. ___ (here insert the number of the plaintiff's elements instruction or verdict director), you must consider whether [(name of plaintiff) or (name of decedent)] was also negligent. Under this Instruction, on the [name of plaintiff's] [here identify the claim to which this instruction applies] claim, whether or not the defendant was partly at fault, you must assess to the [(name of plaintiff) or (name of decedent)] a percentage of the total negligence, if all the following elements have been proved[1]:

First, [(name of plaintiff) or (name of decedent)] (describe the negligent conduct); and

Second, [(name of plaintiff) or (name of decedent)] was thereby negligent[1]; and

Third, that negligence of [(the plaintiff) or (name of decedent)] played a part in [(his) (her)] own injury or damage.

The total of the negligence of [(name of plaintiff) or (name of decedent)] and of the negligence of the defendant for causing [(plaintiff's) or (decedent's) injury must equal 100 percent.

Notes on Use

1. Model Instruction 3.04 (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

2. Define "negligence" under the ordinary reasonable care standard. *See supra* Model Instructions 7.09-7.11 without the bracketed language. *See also Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959).

Committee Comments

See Ballard v. River Fleets, Inc., 149 F.3d 829, 831 (8th Cir. 1998).

8.81 COMPENSATORY DAMAGES

If you find the issues in favor of the [name of plaintiff], you must award an amount that will fairly and justly compensate [(him) or (her)] for any damages you believe [(he) (she)] sustained [and is reasonably certain to sustain in the future] as a direct result of the occurrence mentioned in the evidence.

You should consider the following elements of damages:

(a) physical pain and suffering;

(b) mental anguish;

(c) income loss in the past;

(d) impairment of earning capacity or ability in the future; and

(e) the reasonable value, not exceeding the actual cost to the plaintiff, of medical care that you find will be reasonably certain to be required in the future as a proximate result of the injury in question.

Damages cannot be based on speculation.

8.81A COMPENSATORY DAMAGES (COMPARATIVE FAULT ALTERNATE)

If you find in favor of the [name of plaintiff], then you must determine the entire amount that will fairly and justly compensate [him or her] for any damages you believe [(he) (she)] sustained [and is reasonably certain to sustain in the future] as a result of the incident mentioned in the evidence. If liability is determined, you will then assess the percentages of fault (from zero to 100 percent) for which each party is responsible which caused the [name of plaintiff's] damages determined. Do not reduce or increase any amount of damages you find by any percentage of fault that you find.

You should consider the following elements of damages: physical pain and suffering; mental anguish; income loss in the past; impairment of earning capacity or ability in the future; and the reasonable value, not exceeding the actual cost to the plaintiff, of medical care that you find will be reasonably certain to be required in the future as a proximate result of the injury in question.

Damages cannot be based on speculation.

8.81B PUNITIVE DAMAGES

If you find in favor of (name of plaintiff) and against (name of defendant) under Instruction(s) _____, and if you further find that (name of defendant) acted willfully and wantonly with reckless or callous disregard for the rights of others, or acted with gross negligence or actual malice or criminal indifference, then you may, but are not required to, award punitive damages against that defendant. The purpose of an award of punitive damages is to punish the defendant and to deter [(it) (him) (her)] and others from acting as [(it) (he) (she)] did.

Committee Comments

See Fifth Circuit Pattern Jury Instructions (Civil), § 4.10 (West 2009 Revision) and *Gamma Plastics, Inc. v. American Plastics Lines, Ltd*, 32 F.3d 1244, 1254 (8th Cir. 1994). This instruction may be used in any case of property damage that would otherwise qualify under 28 U.S.C. § 1333, but is before the court on diversity jurisdiction, either as an original action or as a result of being removed, and a jury demand has been made.

This instruction is included because of the Supreme Court opinion in a massive pollution case approving punitive damages under the general maritime law, but only in an amount not to exceed compensatory damages. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). The *Exxon* case does not, however, necessarily resolve the issue of whether general maritime law permits recovery of punitive damages by non-seamen who suffer personal injury or death.

There is presently a split of authority on the issue. *In re Horizon Cruises Litigation*, 2000 WL 685365 (S.D.N.Y. 2000) (acknowledges split among courts); *contra In re Diamond B Marine Services, Inc.*, 2000 WL 222847 (E.D. La. 2000); *O'Hara v. Celebrity Cruises*, 979 F. Supp. 254 (S.D.N.Y. 1997). The *Gamma Plastics* case involved damage to cargo only and its discussion of punitive damages is dicta. Nevertheless, the discussion of the issue in *Gamma* is an indication that the Eighth Circuit would permit recovery of punitive damages in non-seaman wrongful-death cases because the opinion it cites, *Churchill v. F/U FJORD*, 892 F.2d 763 (9th Cir. 1988), is such a case.

Punitive damages are available under general maritime law for a willful failure to pay an injured seaman maintenance and cure. *See Atlantic Sounding Co., Inc. v. Townsend*, ___ U.S. ___, 129 S. Ct.2561, 2009 WL 17894669 (2009).

Admiralty Instructions

This instruction is not to be used in seaman cases under the Jones Act or in unseaworthiness suits under general maritime law. *Cf. Miles v. Apex Marine Corp.,* 498 U.S. 19, 28, 32 (1990); *Atlantic Sounding Co., Inc. v. Townsend,* ___ U.S. ___, 129 S. Ct. 2561 (2009).

8.82 PRESENT VALUE OF FUTURE DAMAGES

If you find that the plaintiff will sustain [specify damages subject to present value reduction, such as, "lost future earnings" or "future medical expenses"], then you must reduce those future damages to their present value.

The present value of future damages is the amount of money that will fully compensate the plaintiff for future damages, assuming that amount is invested now and will earn a reasonably risk-free rate of interest for the time that will pass until the future damages occur.

You must not reduce to present value any non-economic damages you find that plaintiff is reasonably certain to sustain in the future, such as for pain and suffering, or mental anguish.[1]

Notes on Use

1. *Crane v. Crest Tankers, Inc.* 47 F.3d 292, 295 n.5 (8th Cir. 1995).

Committee Comments

The methods of proving the amount of future damages and of reducing that amount to present value can vary with the facts of each case and with the expert opinions and calculations received into evidence in each case. *E.g.,* Beall, Charles F., *Economic Damages in Personal Injury Cases*, Florida Civil Practice Damages, Ch. 3 (The Florida Bar 2005); Landsea, William F., and Roberts, David L., *Inflation and the Present Value of Future Economic Damages*, 37 U. Miami L. Rev. 93 (Nov. 1982).

The Eighth Circuit has commented:

> There are numerous ways of presenting a case involving future damages. Typically the district court will . . . take judicial notice of the plaintiff's life expectancy. If the case involves an issue of future lost wages, generally an expert witness is employed who, once qualified, opines on various issues

including work life expectancy, future damages, and methods of discounting the same to present value.

See Crane v. Crest Tankers, Inc., 47 F.3d 292, 295 (8th Cir. 1995). *See also Jones & Laughlin Steel Corp. v. Pheifer*, 462 U.S. 523, 545-46 (1983); *Crane v. Crest Tankers, Inc.*, 47 F.3d 292, 295 n.4 (8th Cir. 1995) ("It has long been held that life expectancy tables are admissible in damage actions for the 'consideration of the probabilities of damage over a period of years") (*quoting Continental Casualty Company v. Jackson*, 400 F.2d 285, 293 (8th Cir. 1968)).

The Committee believes it is sufficient for the trial judge to instruct the jury about its basic duties of determining the amount of future damages and of reducing to present value, without selecting and instructing the jury on a specific methodology.

8.83 COMPENSATORY DAMAGES NOT TAXABLE

In the event that you award the (name of plaintiff) money damages, you are instructed that the award is not subject to any federal or state income taxes. Therefore, you may not consider taxes in considering any award of damages.

Committee Comments

See Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490 (1980) (instruction is mandatory); *Fanetti v. Hellenic Lines, Ltd.*, 678 F.2d 424, 431 (2nd Cir. 1982); *cf. Flanigan v. Burlington N., Inc.*, 632 F.2d 880, 889 (8th Cir. 1980) (without evidence of an excessive verdict, the failure to give instruction was not prejudicial).

Admiralty Instructions

8.84 DUTY TO MINIMIZE DAMAGES

It is the duty of any person who has been injured to use reasonable diligence and reasonable means, under the circumstances, to prevent the aggravation of [(his) (her)] injury; to act in a way that brings about a recovery from the injury; and to take advantage of any reasonable opportunity [(he) (she)] may have to reduce or minimize loss or damage. [(He) (She)] is required to obtain reasonable medical care and follow [(his) (her)] doctor's reasonable advice and to seek out or take advantage of a business or employment opportunity that was reasonably available to [(him) (her)] under all the circumstances shown by the evidence. You should reduce the amount of the plaintiff's damages by the amount [(he) (she)] could have avoided by obtaining and following reasonable medical care and advice or the amount that the plaintiff could have reasonably realized if [(he) (she)] had taken advantage of such business or employment opportunity, but did not do so.

Committee Comments

See American Mill. Co. v. Trustee of Distribution Trust, 623 F.3d 570, 575 (8th Cir. 2010) ("A party in admiralty can have a legal duty to mitigate damages"); *Rapisardi v. United Fruit Co.*, 441 F.2d 1308, 1312 (2d Cir. 1971); *Saleeby v. Kingsway Tankers, Inc.*, 531 F. Supp. 879, 891 (S.D.N.Y. 1981).

Admiralty Instructions

8.85 "MAINTENANCE" AND "CURE" DEFINED

As used in these instructions, the term "maintenance" means the cost of food and lodging that the plaintiff has actually incurred that is reasonable for a person in [(his) (her)] community or is reasonably necessary for survival, whichever is less, and the reasonable cost of any necessary transportation to and from a medical facility.

As used in these instructions, the term "cure" means the cost of necessary medical attention, including the services of physicians and nurses as well the cost of hospitalization, medicines and medical equipment.

Committee Comments

See Introduction at 11-12; *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938); *Hall v. Noble Drilling (U.S.) Inc.*, 242 F.3d 582 (5th Cir. 2001); *Wactor v. Spartan Transp. Corp.*, 27 F.3d 347, 351-52 (8th Cir. 1994) (definitions of "maintenance" and "cure"; failure of seaman to disclose medical information before employment may be a defense to maintenance and cure); *Stanislawski v. Upper River Servs., Inc.*, 6 F.3d 537, 540 (8th Cir. 1993); *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943, 946 (9th Cir. 1986).

Admiralty Instructions

8.86 MAINTENANCE AND CURE--SUPPLEMENTAL

A seaman is entitled to recover maintenance and cure, if [(he) (she)] becomes injured or ill, without willful misbehavior on [(his) (her)] part, while in the service of [(his) (her)] employer's vessel. A seaman is entitled to maintenance and cure even though [(he) (she)] was not injured as a result of any negligence on the part of [(his) (her)] employer or as a result of the unseaworthiness of the employer's vessel. Moreover, the seaman's injury or illness need not be work-related. It need only occur while the seaman was in the service of [(his) (her)] employer's vessel. Furthermore, an award for maintenance and cure must not be reduced because of any negligence on the part of the plaintiff.

A seaman is entitled to receive maintenance and cure from the date [(he) (she)] leaves the vessel until [(he) (she)] reaches "maximum medical cure." The term "maximum medical cure" means the point at which no further improvement in the seaman's medical condition is reasonably expected. Thus, if it appears that a seaman's condition is incurable, or that treatment will only relieve pain or provide comfort but will not improve the seaman's physical condition, [(he) (she)] has reached maximum medical cure.

If you find that the plaintiff is entitled to an award of damages under [either] the Jones Act [or on an unseaworthiness claim] and if you award [(him) (her)] lost wages or medical expenses, then you may not also award the plaintiff maintenance and cure for the same period of time, because the plaintiff may not recover twice for the same lost wages or medical expenses.

Committee Comments

A seaman's claim for maintenance and cure is separate and distinct from a claim under the Jones Act or for the unseaworthiness of a vessel. *Aguilar v. Standard Oil Co. of N.J.*, 318 U.S. 724 (1943); *Britton v. U.S.S. Great Lakes Fleet, Inc.*, 302 F.3d 812, 816-18 (8th Cir. 2002).

8.90 SPECIAL INTERROGATORIES

I.

NEGLIGENCE CLAIM

1. Was (name of the plaintiff or decedent) a seaman at the time of the incident shown in the evidence?

Answer: _____ (Yes or No)

[If the answer to Interrogatory No. 1 is "Yes," proceed to Interrogatory No. 2. If the answer to No. 1 is "No," do not answer any more interrogatories on this form. The Foreperson must sign this form and return it into court.]

2. Was (name of the plaintiff or decedent) injured in the course of [(his) (her)] employment as a seaman?

Answer: _____ (Yes or No)

[If the answer to Interrogatory No. 2 is "Yes," proceed to Interrogatory No. 3. If the answer to No. 2 is "No," do not answer any more interrogatories on this form**.** The Foreperson must sign this form and return it into court.]

3. Did the defendant [here describe the act or omission submitted by the plaintiff]?

Answer: _____ (Yes or No)

[If the answer to Interrogatory No. 3 is "Yes," proceed to Interrogatory No. 4. If the answer to No. 3 is "No," do not answer No. 4, but proceed to No. 7.]

4. Was the act or omission of the defendant [here describe the act or omission submitted by the plaintiff] [found with respect to the answer to No. 3] negligent?

Answer: _____ (Yes or No)

[If the answer to Interrogatory No. 4 is "Yes" proceed to Interrogatory No. 5. If the answer to No. 4 is "No," do not answer No. 5, but proceed to No. 7.]

5. Did (name of defendant's) negligence [here describe the act or omission submitted by the plaintiff] [found with respect to the answer to No. 3] cause injury to (name of plaintiff)?

Answer: _____ (Yes or No)

[If the answer to Interrogatory No. 5 is "Yes," proceed to Interrogatory No. 6. If the answer to No. 5 is "No," do not answer No. 6, but proceed to No. 7.]

6. State the total amount of damages that the plaintiff has suffered [and is reasonably certain to suffer in the future] as a result of the incident established in the evidence**.**

Answer: _____Dollars ($_____).

II.

UNSEAWORTHINESS CLAIM

7. At the time and place established in the evidence, was the vessel (here name the subject vessel) in an unseaworthy condition in that it (here state condition of vessel submitted by the plaintiff)?

Answer: _____ (Yes or No)

[If the answer to Interrogatory No. 7 is "Yes" proceed to Interrogatory No. 8. If the answer to No. 7 is "No," proceed to No. 10.]

8. Was the unseaworthy condition of the [here name the subject vessel], with respect to No. 7, a substantial factor in causing any injury or damage sustained by the plaintiff?

Answer: _____ (Yes or No)

[If the answer to Interrogatory No. 8 is "Yes," proceed to Interrogatory No. 9. If the answer to No. 8 is "No," do not answer No. 9, but proceed to No. 10.]

9. State the total amount of damages that (name of plaintiff) has suffered [and is reasonably certain to suffer in the future] as a result of the incident established in the evidence**.**

Answer: _____Dollars ($_____).

III.

COMPARATIVE NEGLIGENCE DEFENSE
(Plaintiff)

10(a). Do you find that (name of plaintiff] [describe act or omission]?

Answer: _____ (Yes or No)

[Note: If the answer to Interrogatory No. 10 (a) is "Yes," answer No. 10(b). If the answer to No. 10(a) is "No," do not answer No. 10(b), but proceed to answer No. 11(a).]

10(b). Do you find that the act or omission of (name of plaintiff) [describe act or omission] was negligent?

Answer: _____ (Yes or No)

[Note: If the answer to Interrogatory No. 10(b) is "Yes," answer No. 10(c). If the answer to No. 10(b) is "No," do not answer No. 10(c), but proceed to answer No. 11(a).]

10(c). Do you find that the negligence of (name of plaintiff), found in the answer to No. 10(a) caused, in whole or in part, his own damage or injury?

Answer: _____ (Yes or No)

COMPARATIVE NEGLIGENCE DEFENSE
(Settling Defendant)

11(a). Do you find that (name of settling defendant) [describe act or omission]?

Answer: _____ (Yes or No)

[Note: If the answer to Interrogatory No. 11(a) is "Yes," answer No. 11(b). If the answer to No. 11(a) is "No," do not answer No. 11(b), but proceed to answer No. 12.]

11(b). Do you find that [name of settling defendant] was negligent in [describe act or omission]?

Answer: _____ (Yes or No)

[Note: If the answer to Interrogatory No. 11(b) is "Yes," answer No. 11(c). If the answer to No. 11(b) is "No," do not answer No.11(c), but proceed to answer No. 12.]

11(c). Do you find that the negligence of (name settling defendant), found in the answer to No. 11(b) caused, in whole or in part, damage or injury to (name of plaintiff)?

Answer: _____ (Yes or No).

12. State the percentage(s) of the relative fault, if any, for the plaintiff's damages to the following:

(a) (name of the defendant) _____%

(b) (name of the plaintiff) _____%

(c) (name of the settling defendant) _____%.

[TOTAL MUST EQUAL 100%] 100 %

_____
(FOREPERSON)

_____
(DATE)

9. DEFINITIONS

Definitions

9.01 AGENCY

A corporation acts only through its agents or employees and any agent or employee of a corporation may bind the corporation by acts and statements made while acting within the scope of the authority delegated to the agent by the corporation, or within the scope of [(his) (her)] duties as an employee of the corporation.

Committee Comments

This instruction is a modification of Kevin F. O'Malley, et al., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: Civil § 108.01 (5th ed. 2000).

The authority of an agent to speak for the principal may vary from state to state and differ from federal law.

Definitions

9.02 COLOR OF STATE LAW (42 U.S.C. § 1983)

Acts are done under color of law when a person acts or purports to act in the performance of official duties under any state, county or municipal law, ordinance or regulation.

Committee Comments

Adopted from *9th Cir. Civ. Jury Instr.* 9.2 (2007). *See Monroe v. Pape*, 365 U.S. 167 (1961), *overruled in part*, *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Screws v. United States*, 325 U.S. 91 (1945); *United States v. Classic*, 313 U.S. 299, *reh'g denied*, 314 U.S. 707 (1941). The court should, if possible, rule on the record whether the conduct of the defendant, if it occurred as claimed by the plaintiff, constitutes acts under color of state (county, municipal) law and not even instruct the jury on this issue. In most cases, the color of state law issue is not challenged and the jury need not be instructed on it. If it must be instructed, this instruction should normally be sufficient.

Definitions

9.03 DELIBERATE INDIFFERENCE - CONVICTED PRISONERS (42 U.S.C. § 1983)

Deliberate indifference is established only if there is actual knowledge of a substantial risk that the plaintiff (describe serious medical problem or other serious harm that the defendant is expected to prevent) and if the defendant disregards that risk by intentionally refusing or failing to take reasonable measures to deal with the problem. Mere negligence or inadvertence does not constitute deliberate indifference.

Committee Comments

See Farmer v. Brennan, 511 U.S. 825 (1994) (clearly limiting deliberate indifference to intentional, knowing or recklessness in the criminal law context which requires actual knowledge of a serious risk). *Wilson v. Seiter*, 501 U.S. 294 (1991). The court is limiting Eighth Amendment claims to those in which the plaintiff can show actual subjective intent rather than just recklessness in the tort sense. In *Wilson*, the court characterized as Eighth Amendment violations only acts which are "*deliberate* acts *intended* to chastise or deter" (emphasis added) or "punishment which has been administered for a disciplinary *purpose*" (emphasis added). *Wilson*, 501 U.S. at 300. The court, continuing to follow the deliberate indifference standard, clearly stated that negligence was not sufficient.

The Committee believe the phrase "deliberate indifference" should probably be defined in most cases, although Eighth Circuit case law does not require it.

Definitions

9.04 MOTIVATING FACTOR

As used in these instructions, the plaintiff's (sex, gender, race, national origin, religion, disability)[1] was a "motivating factor," if the plaintiff's (sex, gender, race, national origin, religion, disability) played a part[2] [or a role[3]][4] in the defendant's decision to _____[5] the plaintiff. However, the plaintiff's (sex, gender, race, national origin, religion, disability) need not have been the only reason for the defendant's decision to _____ the plaintiff.

Notes on Use

1. Here state the alleged unlawful consideration.

2. *See Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1101-02 (8th Cir. 1988).

3. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) ("Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.")

4. Case law suggests that other language can be used properly to define "motivating factor." A judge may wish to consider the following alternatives:

The term "motivating factor," as used in these instructions, means a reason, alone or with other reasons, on which the defendant relied when it _____ the plaintiff[, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42 (1989);] or which moved the defendant toward its decision to _____ the plaintiff[, *id.* at 241;] or because of which the defendant _____ the plaintiff[, 29 U.S.C. § 623(a)(1) (ADEA); 42 U.S.C. § 2000e-2 (Title VII); 42 U.S.C. § 12112(a) (ADA)].

5. Here state the alleged adverse employment action.

6. "Determining factor" is appropriate to signify the sole cause in an indirect evidence, pretext case brought under the decisional format of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1101-02 (8th Cir. 1988). "Motivating" is often used in a direct evidence, mixed-motive case brought under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), to signify the multiple factors, at least one of which is assertedly unlawful, which caused the adverse employment decision. 42 U.S.C. § 2000e-2(m); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1350-51 (8th Cir. 1995); *Parton v. GTE North, Inc.*, 971 F.2d 150, 153 (8th Cir. 1992); *Foster v. University of Ark.*, 938 F.2d 111, 114 (8th Cir. 1991). "Determining factor" also has been used in a mixed-motive case. *Williams v. Fermenta Animal Health Co.*, 984 F.2d 261, 265 (8th Cir. 1993). "Substantial factor" and "motivating factor" have been used to convey the same legal standard. *Mt. Healthy City*

Definitions

School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); *Glover v. McDonnell Douglas Corp.*, 981 F.2d 388, 393-95 (8th Cir.), *vacated and remanded on other grounds*, 510 U.S. 802 (1993), 12 F.3d 845 (8th Cir. 1994). "Motivating factor" has been used with "determining factor" in the decisional calculus of a single cause, pretext case. *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 801 (8th Cir. 1994). "Discernible factor" has been equated with "motivating factor" in a mixed-motive case. *Estes*, 856 F.2d at 1102.

7. "Motive" (the root of "motivating") is defined as "something that causes a person to act in a certain way, do a certain thing, etc." Random House Compact Unabridged Dictionary, Motive, p.1254 (Special Second Edition, 1996).

8. The Age Discrimination in Employment Act, at 29 U.S.C. § 623(a)(1), and Title VII of the Civil Rights Act of 1964, as amended, at 42 U.S.C. § 2000e-2(a), also use the phrase "because of" to describe the prohibited causal relationship between the defendant's intention and factors which may not be used in making an employment decision.

Committee Comments

For the trials of disparate treatment cases, the Committee has selected the term "motivating factor" to constitute the subject matter of the defendant's asserted, unlawful state of mind when the action sued upon occurred. Whether this term or another term[6] is selected is immaterial as long as the term used signifies the proper legal definition for the jury. A court may decide that the term "motivating factor" need not be defined expressly because its common definition[7] is also the applicable legal definition.

The Americans With Disabilities Act prohibits each "covered entity" from discriminating against a "qualified individual" with a disability in an employment context "because of"[8] the disability. *See* 42 U.S.C. § 12112(a). The gist of the term "because of" is intentional discrimination which resulted in the employment decision adverse to the plaintiff, whether in a sole cause, pretext context or in a mixed-motive context. The burden on the plaintiff, in both a sole cause and a mixed-motive case, is to prove to the factfinder that the adverse employment decision resulted from the unlawful motive, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, ___, 113 S. Ct. 2742, 2751-52 (1993), and the burden of proof on the defendant in a mixed-motive case is to prove, as an affirmative defense, that the same decision would have been made absent the unlawful motive. *Price Waterhouse*, 490 U.S. at 258. The evidence offered in what starts out as the trial of a sole cause case may support a finding of a mixed-motive liability. *See Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 801 (8th Cir. 1994) (the employer's proffered nondiscriminatory explanation may permit an inference of the existence of an unlawful motivating factor). In both contexts, the plaintiff's ultimate burden is to persuade the factfinder that the defendant intentionally acted adversely to the plaintiff for a proscribed reason. *St. Mary's Honor Center v. Hicks*, 509 U.S. at ___, 113 S. Ct. at 2747.

Definitions

Each of the definitions of "motivating factor" set out in this section accurately states the law.

10. THE FAIR LABOR STANDARDS ACT (FLSA)

Introduction

The following instructions are for use in Fair Labor Standards Act ("FLSA") cases where failure to pay minimum wage or overtime compensation is alleged. 29 U.S.C. § 201, *et seq*. The FLSA is a remedial statute that was enacted to eliminate "the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." *Id.* § 202(a). Generally under the FLSA, employers must pay employees the applicable minimum wage for each hour worked, and must pay 1½ times the regular rate for all hours worked in excess of forty in one week. *Id.* §§ 206, 207. The FLSA contains numerous exemptions and exceptions to these general rules.

The following instructions are intended for use in cases involving one (or a few) plaintiffs. Section 216(b) of the FLSA also provides for collective actions, a unique multi-plaintiff litigation process. As a general matter, section 216(b) allows courts, in a single proceeding, to hear claims brought by multiple plaintiffs against the same employer if those plaintiffs are found to be "similarly situated." *Id.* § 216(b); *see Hoffmann-La Roche v. Spearling*, 493 U.S. 165 (1989). The collective action process is distinct in several critical respects from the class actions procedures of Rule 23, Federal Rules of Civil Procedure. Perhaps chief among the differences is that collective action plaintiffs join the lawsuit by affirmatively and individually "opting-in" rather than by choosing not to "opt out" as is the case in Rule 23 class actions. *See* 29 U.S.C. § 216(b) ("No employee shall be a plaintiff to any such action unless the employee gives consent in writing to become a party and consent is filed in the court in which the action is brought."). The full effect of these procedural differences continues to be explored by the courts, and disputes often arise concerning the extent to which evidence may be presented on a representative basis. District courts should carefully consider the manner in which these instructions may modified for use in collective actions.

General Considerations

Although there are common themes in FLSA cases, claims often turn on specific provisions of the statute, regulations, case law and other authority. Consequently, although certain basic instructions as set forth in this section may be useful, district courts must carefully consider the precise nature of the issues to be tried in each case, and adopt, reject, modify, and/or supplement these instructions as appropriate for the case.

In crafting appropriate instructions, courts must also carefully consider the nature of relevant authority. For example, with respect to matters such as certain minimum wage and overtime exemptions, the Secretary of Labor has promulgated regulations pursuant to express delegation of statutory authority. *See, e.g.*, 29 C.F.R. § 541. In addition, the Secretary of Labor and Department of Labor's Wage and Hour Division have established a substantial body of "interpretive guidance." Much of this guidance is published in the Code of Federal Regulations. *See, e.g.*, 29 C.F.R. ch. 531 subpart C, ch. 775-94. Other guidance appears in the form of interpretive bulletins and private opinion letters. When considering agency interpretations, "a court must first ask whether

Congress has directly spoken to the precise question at issue." *Glover v. Standard Federal Bank*, 283 F.3d 953, 961 (8th Cir. 2002) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). "[T]he plain meaning of a statute or regulation controls, if there is one, regardless of an agency's interpretation." *St. Luke's Methodist Hospital v. Thompson*, 182 F. Supp. 2d 765, 775 (N.D. Iowa 2001) (citing *Hennepin County Med. Ctr. v. Shalala*, 81 F.3d 743, 748 (8th Cir. 1996)).

Where there is room for agency interpretation, interpretive guidance from the Secretary of Labor and Wage and Hour Division may, in certain circumstances, be entitled to varying degrees of "deference" or "respect" by courts, depending on the form of guidance. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Chevron,* 467 U.S. at 842; *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Employee and Enterprise Coverage

To prove a case for FLSA overtime or minimum wage violations, a plaintiff must prove he or she was employed by a covered defendant and that defendant failed to pay plaintiff minimum wage or overtime as required by law. *Hensley v. MacMillan Bloedel Containers, Inc.*, 786 F.2d 353 (8th Cir. 1986).

As a threshold matter, FLSA plaintiffs must prove that an employment relationship existed with the defendant. *Reich v. ConAgra, Inc.*, 987 F.2d 1357, 1360 (8th Cir. 1993). Employee is defined by section 203(e)(1) as "any individual employed by an employer." This definition has been interpreted as broad and expansive. *See United States v. Rosenwasser*, 323 U.S. 360, 363 (1945). "Employer" is defined in Section 203(d) as "any person acting directly or indirectly in the interest of an employer in relation to an employee." *Id.* The term "employ" is defined in section 203(g) expansively as "to suffer or permit to work." *Id.* The Supreme Court has rejected the common law "right-to-control test" and concluded that the "economic reality" test more appropriately satisfies the intended broad application of the statute's protections. *See, e.g., NLRB v. Heart Publications*, 322 U.S. 111 (1944). Although the existence of an employment relationship is often not disputed, common examples of workers who do not satisfy the requirement of an employment relationship are independent contractors, trainees, and volunteers.

Additionally, to satisfy coverage requirements, a plaintiff must prove either individual employee coverage or enterprise coverage. *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005). Individual coverage is established when the plaintiff, in his or her work for the defendant, is engaged in commerce or the production of goods for commerce. 29 U.S.C. §§ 206(a), 207(a)(1), 212(c). Enterprise coverage requires that the defendant is "an enterprise engaged in commerce or the production of goods for commerce that had annual gross sales of at least $500,000." 29 U.S.C. § 203(s)(1).

Common Types of Cases

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The three most common types of FLSA wage disputes involve (1) misclassification, (2) off-the-clock, and (3) payroll and compensation practices.

Misclassification Cases

FLSA litigation frequently involves statutory exemptions from the minimum wage and/or overtime requirements. In such cases, the employer is alleged to have "misclassified" employees as exempt from the FLSA. These cases often involve exemptions known as "white collar" exemptions, which include individuals employed in a bona fide executive, administrative, professional, or outside sales position. 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541. Exemptions are to be narrowly construed against the employer and the employer carries the burden of proving an exemption applies. *McDonnell v. City of Omaha*, 999 F.2d 293, 295 (8th Cir. 1993) (Employers have the burden of proving that the exemption applies, and they must demonstrate that their employees fit "plainly and unmistakably within the exemption's terms and spirit.").

Misclassification cases also often involve off-the-clock/payroll practice issues due to the employer's failure to track and record time worked. Therefore, where it is determined that an employer misclassified plaintiff, analysis under the other two major types of cases likely will be necessary.

Off-the-Clock Cases

Ordinarily in off-the-clock cases employers have failed to keep records of the plaintiff-employee's time worked or otherwise improperly recorded time-worked. Reasons for the failure to record all hours worked vary and, for example, may be due to misclassification as exempt or the employer's belief that the activity at issue is not compensable. Such instances may include preparatory and concluding activities such as "donning and doffing," travel time, waiting time, and rest or meal periods.

Payroll Practices/Calculations

Payroll practices are generally at issue when employees' pay was allegedly calculated improperly. Common issues include the allegedly improper calculation of the regular rate for overtime purposes such as when certain bonuses or commissions are not included in the calculation. Other common issues involve tipped employees and employees paid by the job, piece, or task. Payroll practices that involve unlawful deductions comprise another commonly litigated issue. Deduction concerns typically arise when an employer reduces employees' paychecks in amounts meant for items such as uniforms, shortages or other debts.

Significance of Recordkeeping

Section 211(c) of the FLSA requires employers to "make, keep and preserve records" of employees' "wages, hours, and other conditions and practices of employment." *Id.*; 29 C.F.R. § 516(1). Although there is no private cause of action against an employer for noncompliance with recordkeeping obligations, improper

recordkeeping practices may have a significant evidentiary impact in FLSA cases. Where an employer has not kept adequate records of wages and hours, employees generally may not be denied recovery of back wages on the ground that the precise extent of their uncompensated work cannot be proved. *Dole v. Alamo Foundation*, 915 F.2d 349, 351 (8th Cir. 1990). Instead, the employees "are to be awarded compensation on the most accurate basis possible." *Id.* (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946)). The plaintiff must establish "a just and reasonable inference" as to the uncompensated work performed. *Anderson*, 328 U.S. at 687-88. Plaintiffs may satisfy this requirement with evidence of their regular work schedules or work habits, *e.g.*, such as calendars, computer records, parking records, or coworker testimony. Once the plaintiff has produced such evidence of uncompensated labor, "the burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.*

Retaliation

It is unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint . . . under or related to this chapter." *Id.* § 215(a)(3); *Grey v. City of Oak Grove*, 396 F.3d 1031, 1034-35 (8th Cir. 2005); *Brennan v. Maxey's Yamaha*, 513 F.2d 179 (8th Cir. 1975). *See* section 5.60 of this Manual for instructions relating to retaliation claims.

Statute of Limitations

Ordinarily, FLSA claims must be brought within two years, but the statute of limitations is extended to three years if it is proven that the employer "willfully" violated the law. *See* 29 U.S.C. § 255(a). A violation is "willful" where "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). The recovery period generally is calculated backward from the date that the lawsuit is filed or from the date a consent to join form is filed on behalf of an opt-in plaintiff in a collective action pursuant to 29 U.S.C. § 216(b).

Damages

Backpay damages are generally calculated as the difference between what the employee should have been paid had the employer complied with the FLSA and the amount the employee actually was compensated. In addition, liquidated damages in an amount equal to the amount of backpay will be awarded unless the employer proves that it acted in good faith and had reasonable grounds for believing that it was not in violation of the FLSA. 29 U.S.C. § 216(b); *Jarrett v. ERC Properties, Inc.*, 211 F.3d 1078, 1083 (8th Cir. 2000). The burden is on the employer to prove it acted in good faith. *Broadus v. O.K. Industries, Inc.*, 226 F.3d 937, 944 (8th Cir. 2000) (Equal Pay Act). This determination is made by the court. *See Braswell v. City of El Dorado*, 187 F.3d 954, 957 (8th Cir.1999). "The jury's decision on willfulness [for statute of limitations

purposes] is distinct from the district judge's decision to award liquidated damages," *id.*, but "it is hard to mount a serious argument . . . that an employer who has acted in reckless disregard of its obligations has nonetheless acted in good faith." *Jarrett*, 211 F.3d at 1084.

The Fair Labor Standards Act (FLSA)

10.01 FLSA – ELEMENTS

Your verdict must be for plaintiff [and against defendant _____][1] [on plaintiff's FLSA claim][2] if all the following elements have been proved:

First, plaintiff was employed by defendant on or after _____;[3]

Second, in plaintiff's work for defendant, plaintiff [was engaged in commerce or in the production of goods for commerce] [was employed by an enterprise engaged in commerce or the production of goods for commerce that had annual gross sales of at least $500,000];[4] and

Third, defendant failed to pay plaintiff [minimum wage for all hours worked by plaintiff in one or more workweeks] [overtime pay for all hours worked by plaintiff in excess of 40 in one or more workweeks].[5]

[The term "commerce" means any trade, commerce, transportation, transmission or communication between any state and any place outside that state.]

[A person or enterprise is considered to have been "engaged in the production of goods" if the person or enterprise produced, manufactured, mined, handled, transported, or in any other manner worked on such goods or worked in any closely related process or occupation directly essential to the production of the goods.]

Notes on Use

1. Use this phrase if there are multiple defendants.

2. The bracketed language should be inserted when the plaintiff submits more than one claim to the jury.

3. This paragraph should be used only if employee status or dates of employment are disputed. Insert the date or dates of relevant recovery period.

4. This paragraph, and the appropriate bracketed language, should be inserted only when applicability of the FLSA is in dispute.

5. Select the appropriate bracketed language.

The Fair Labor Standards Act (FLSA)

10.02 FLSA – "HOURS WORKED" DEFINITION[1]

The phrase "hours worked" includes all time spent by an employee that was primarily for the benefit of the employer or the employer's business.[2] Such time constitutes "hours worked" if the employer knew or should have known that the work was being performed.[3] Periods during which an employee is completely relieved of duty that are long enough to enable the employee to use the time effectively for his own purposes are not "hours worked."[4]

Notes on Use

1. This instruction is intended for use only when there is a dispute as to whether certain activities constitute hours worked, or there is a dispute as to the number of hours worked. The language should be modified to reflect the specific circumstances of the case based on case law and the Department of Labor guidance published at 29 C.F.R. part 785.

2. The FLSA does not define "work" but uses the term in its definition of "employ." *See* 29 U.S.C. § 254. Under the Act, "employ" means "to suffer or permit to work." 29 U.S.C. § 203(g); s*ee also* 29 C.F.R. § 785.6. The "suffer or permit" test provides that time spent on a "principal activity" for the benefit of the employer, with the employer's knowledge, is considered to be hours worked and therefore is compensable. *Id.*; *see Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005).

3. An employer must know or have reason to believe that the employee is working. 29 C.F.R. § 785.11; s*ee Donovan v. Williams Chem. Co.*, 682 F.2d 185, 188 (8th Cir. 1982). An employer who has such knowledge cannot passively allow an employee to work without proper compensation, even if the work has not been done at the request of the employer.

4. The Supreme Court in *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 598 (1946), stated that there need not be physical or mental exertion at all on the part of the employee and that, when the employee is required to give up a substantial measure of his or her time and effort, the time is hours worked. Accordingly, the workweek typically includes "all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place." *Id.* at 690-91. Periods during which an employee is completely relieved of duty that are long enough to enable the employee to use the time effectively for his or her own purposes, however, are not considered "hours worked." An employee is not completely relieved from duty unless the employee is told he or she can cease work until a definitely specified time. For example, a meal period of at least 30 minutes during which an employee is completely relieved from duties does not ordinarily constitute hours worked, even if the employee is not permitted to leave the employer's premises. 29 C.F.R. §785.19. Additionally, rest or

break periods of 20 minutes or less must be included in "hours worked." 29 C.F.R. § 785.18.

The Fair Labor Standards Act (FLSA)

10.03 FLSA – DETERMINING HOURS WORKED[1]

You must determine the number of hours worked by plaintiff based on all of the evidence. The defendant is legally required to maintain accurate records of its employees' hours worked. If you find that the defendant failed to maintain records of the plaintiff's hours worked or that the records kept by the defendant are inaccurate, you must accept plaintiff's estimate of hours worked, unless you find it to be unreasonable.

Notes on Use

1. Use this instruction only when the number of hours worked is in dispute.

Committee Comments

The FLSA requires employers to "make, keep and preserve such records of the persons employed by him and of wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator [of the Department of Labor's Wage and Hour Division] as he shall prescribe by regulation or order . . . ." 29 U.S.C. § 211(c). The Department of Labor's record-keeping regulations may be found at 29 C.F.R. § 516. The FLSA does not create a private cause of action against an employer for noncompliance with record-keeping obligations. Where an employer has not kept adequate records of wages and hours, however, employees generally may not be denied recovery of back wages on the ground that the precise extent of their uncompensated work cannot be proved. *Dole v. Alamo Foundation*, 915 F.2d 349, 351 (8th Cir. 1990). Instead, the employees "are to be awarded compensation on the most accurate basis possible." *Id.* (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946)). The plaintiff bears the burden of proving the extent of any uncompensated work, but may satisfy that burden by "just and reasonable inference." *Anderson*, 328 U.S. at 687-88. Once the plaintiff has produced such evidence of uncompensated work, "the burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* The Committee believes the proposed instruction properly allocates the relative burdens of proof consistent with *Anderson*, without the risk of confusion that may be associated with an instruction that incorporates the exact language of the *Anderson* decision.

The Fair Labor Standards Act (FLSA)

10.04 FLSA – MINIMUM WAGE[1]

An employer must pay at least minimum wage for all hours worked by an employee each workweek. The minimum wage rate applicable in this case is as follows:

[_____ to July 23, 2007 – $5.15 per hour

July 24, 2007 to July 23, 2008 – $5.85 per hour

July 24, 2008 to July 23, 2009 – $6.55 per hour

July 24, 2009 to _____ – $7.25 per hour.]

You may have heard about other minimum wage rates that may be applicable in certain states. You must not consider any minimum wage rates other than those listed above.

Notes on Use

1. This instruction is intended for use only when the plaintiff claims unpaid minimum wage. Select the minimum wage rate(s) applicable to the period of time at issue.

The Fair Labor Standards Act (FLSA)

10.05 FLSA – MINIMUM WAGE CREDIT FOR BOARD AND LODGING[1]

In determining whether an employer has paid the minimum wage, the employer is entitled to a credit for the reasonable cost it incurred in furnishing board, lodging or other facilities to an employee if the employer regularly provided the board, lodging, or other facilities for the benefit of the employee.

Notes on Use

1. This instruction is intended for use only when the defendant claims credit for board and/or lodging. The instruction should be modified to reflect the specific circumstances of the case, based on applicable case law and the Department of Labor guidance published at 29 C.F.R. part 531.

The Fair Labor Standards Act (FLSA)

10.06 FLSA – OVERTIME COMPENSATION[1]

An employer must pay overtime compensation in any workweeks in which an employee has more than 40 "hours worked," as defined in Instruction No. __. Overtime compensation must be paid at a rate at least one and one-half times the employee's regular rate of pay for all hours worked in excess of 40.

An employee's "regular rate of pay" is determined by totaling all the compensation that should have been paid to the employee for the workweek, excluding any overtime premium pay and any pay for vacation, holiday, or illness, and then dividing that total by all of the employee's hours worked for that workweek. If the employee is employed solely at a single hourly rate, the hourly rate is his "regular rate of pay."

Notes on Use

1. This instruction is intended for use only when the plaintiff claims unpaid overtime compensation. The language regarding regular rate of pay should be modified to reflect the specific circumstances of the case, based on applicable case law and the Department of Labor guidance published at 29 C.F.R. part 778.

The Fair Labor Standards Act (FLSA)

10.07 FLSA – WORKWEEK DEFINITION[1]

A "workweek" is a regularly recurring period of seven days or 168 hours, as designated by the employer. [In this case, the parties have stipulated – that is, they have agreed – that the workweek was from [day of week] at [time] to [day of week] at [time].]

Notes on Use

1. This instruction is intended for use only when the Court determines that "workweek" should be defined to assist the jury. The bracketed language should be inserted if the parties have so stipulated.

The Fair Labor Standards Act (FLSA)

10.20 FLSA – EXECUTIVE EMPLOYEE EXEMPTION

Your verdict must be for defendant [on plaintiff's FLSA claim][1] if all of the following elements have been proved:

First, plaintiff was compensated on a salary basis as defined in Instruction No. ___[2] at a rate not less than $455[3, 4] per week[5]; and

Second, plaintiff's principal, main or most important duty was management[6] of [(the enterprise in which plaintiff was employed) or (a customarily recognized department or subdivision of the enterprise in which plaintiff was employed)][7]; and

Third, plaintiff customarily and regularly directed the work of at least two or more other full-time employees or their equivalent; and

Fourth, plaintiff had authority to hire and fire other employees, or plaintiff's suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status of other employees were given particular weight.

The phrase "customarily and regularly" means a frequency that is greater than occasional, but may be less than constant. Work performed customarily and regularly includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.

Notes on Use

1. Insert the bracketed language if more than one claim is submitted to the jury.

2. Insert the number of the "salary basis" instruction.

3. The $455 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if plaintiff is compensated biweekly on a salary basis of $910, semimonthly on a salary basis of $985.83, or monthly on a salary basis of $1,971.66. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b).

4. Or $380 per week, if employed in American Samoa by employers other than the Federal Government.

5. Exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).

6. Generally, management includes activities such as interviewing, selecting, and training of employees; setting and adjusting employee rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in

supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures. 29 C.F.R. § 541.102.

7. Select the bracketed language as appropriate for the claimed exemption.

The Fair Labor Standards Act (FLSA)

10.21 FLSA – ADMINISTRATIVE EMPLOYEE EXEMPTION

Your verdict must be for defendant [on plaintiff's FLSA claim][1] if all of the following elements have been proved:

First, plaintiff was compensated on a salary basis[2] as defined in Instruction No. ___[3] at a rate not less than $455[4, 5] per week[6, 7]; and

Second, plaintiff's primary duty was the performance of office or non-manual work directly related to the management or general business operations[8] of defendant or defendant's customers; and

Third, plaintiff's primary duty included the exercise of discretion and independent judgment with respect to matters of significance.[9]

The term "primary duty" means the principal, main, major or most important duty that plaintiff performs.

Notes on Use

1. Insert the bracketed language if more than one claim is submitted to the jury.

2. Compensation may also be on a fee basis. If the case involves a fee basis issue, this instruction should be modified accordingly. *See* 29 C.F.R. § 541.605.

3. Insert the number of the "salary basis" instruction.

4. The $455 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if plaintiff is compensated biweekly on a salary basis of $910, semimonthly on a salary basis of $985.83, or monthly on a salary basis of $1,971.66. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b).

5. Or $380 per week, if employed in American Samoa by employers other than the Federal Government.

6. Exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).

7. In the case of academic administrative employees, the compensation requirement also may be met by compensation on a salary basis at a rate at least equal to the entrance salary for a teacher in the educational establishment where plaintiff is employed. 29 C.F.R. § 541.600(c). *See* 29 C.F.R. § 541.204(a)(1).

8. "Work directly related to management or general business operations" includes work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research;

safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. 29 C.F.R. § 541.201(b).

9. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances. 29 C.F.R. § 541.202 (b).

Committee Comments

A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations. 29 C.F.R. § 541.2.

The following are types of positions that may qualify for the administrative employee exemption: insurance claims adjusters; employees in the financial services industry; an employee who leads a team of other employees assigned to complete major projects (such as purchasing, selling, or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements); an executive assistant or administrative assistant to a business owner or senior executive of large business; human resources managers who formulate, interpret or implement employment policies; management consultants who study the operations of a business and propose changes in the organization; and purchasing agents with authority to bind the company on significant purchases. 29 C.F.R. § 541.203.

The following are types of positions that typically do not qualify for the administrative employee exemption: personnel clerks who screen applicants to obtain data regarding their minimum qualifications and fitness for employment; ordinary inspection work; examiners or graders (such as employees that grade lumber);

comparison shopping performed by an employee of a retail store who reports to the buyer the prices at the competitor's store; public sector inspectors or investigators, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists; and similar employees. 29 C.F.R. § 541.203.

The Fair Labor Standards Act (FLSA)

10.22 FLSA – LEARNED PROFESSIONAL EXEMPTION

Your verdict must be for defendant [on plaintiff's FLSA claim][1] if all of the following elements have been proved:

First, plaintiff was compensated on a salary basis[2] as defined in Instruction No. ___[3] at a rate not less than $455[4, 5] per week;[6] and

Second, plaintiff's principal, main, major or most important duty was the performance of work requiring advanced knowledge in a field of science or learning.[7]

The term "advanced knowledge" means work that is predominantly intellectual in character, and that requires the consistent exercise of discretion and judgment. Advanced knowledge is customarily acquired by a prolonged course of specialized intellectual instruction.

Notes on Use

1. Insert the bracketed language if more than one claim is submitted to the jury.

2. Compensation may also be on a fee basis. If the case involves a fee basis issue, this instruction should be modified accordingly. *See* 29 C.F.R. § 541.605. The salary basis and minimum salary requirements are inapplicable to certain employees engaged in teaching or the practice of law or medicine. *See* 29 C.F.R. § 541.303 and 304.

3. Insert the number of the "salary basis" instruction.

4. The $455 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if plaintiff is compensated biweekly on a salary basis of $910, semimonthly on a salary basis of $985.83, or monthly on a salary basis of $1,971.66. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b).

5. Or $380 per week, if employed in American Samoa by employers other than the Federal Government.

6. Exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).

7. "Field of science or learning" includes traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status. 29 C.F.R. § 541.301(c). This instruction should be modified, as appropriate, for employees engaged in teaching or the practice of law or medicine. *See* 29 C.F.R. § 541.303 and 304.

Committee Comments

A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations. 29 C.F.R. § 541.2.

The following are types of positions that may qualify for the learned professional exemption: registered or certified medical technologists, registered nurses, dental hygienists, physicians' assistants, certified public accountants, executive chefs and sous chefs, certified athletic trainers, and licensed funeral directors and embalmers. 29 C.F.R. § 541.301(e).

The following are types of positions that typically do not qualify for the learned professional exemption: licensed practical nurses and other similar health care employees, accounting clerks, bookkeepers and other employees who normally perform a great deal of routine work, cooks who predominantly perform routine mental, manual, mechanical or physical work, and paralegals and legal assistants. 29 C.F.R. § 541.301(e).

The Fair Labor Standards Act (FLSA)

10.23 FLSA – CREATIVE PROFESSIONAL EXEMPTION

Your verdict must be for defendant [on plaintiff's FLSA claim][1] if all of the following elements have been proved:

First, plaintiff was compensated on a salary basis[2] as defined in Instruction No. ___[3] at a rate not less than $455[4, 5] per week;[6] and

Second, plaintiff's principal, main, major or most important duty was the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.[7]

Notes on Use

1. Insert the bracketed language if more than one claim is submitted to the jury.

2. Compensation may also be on a fee basis. If the case involves a fee basis issue, this instruction should be modified accordingly. *See* 29 C.F.R. § 541.605.

3. Insert the number of the "salary basis" instruction.

4. The $455 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if plaintiff is compensated biweekly on a salary basis of $910, semimonthly on a salary basis of $985.83, or monthly on a salary basis of $1,971.66. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b).

5. Or $380 per week, if employed in American Samoa by employers other than the Federal Government.

6. Exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).

7. Recognized fields of artistic and creative endeavor include music, writing, acting and the graphic arts. 29 C.F.R. § 541.302(b).

Committee Comments

A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations. 29 C.F.R. § 541.2.

The performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor is distinguished from routine mental, manual, mechanical or physical work. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training. The requirement of "invention, imagination, originality or talent" distinguishes the creative

professions from work that primarily depends on intelligence, diligence and accuracy. The duties of employees vary widely, and may depend on the extent of the invention, imagination, originality or talent exercised by the employee. 29 C.F.R. § 541.302(a) and (b).

The following are types of positions that may qualify for the creative professional exemption: actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short-story writers and screen-play writers who choose their own subjects and hand in a finished piece of work to their employers; and persons holding the more responsible writing positions in advertising agencies. 29 C.F.R. § 541.302(c).

Journalists may satisfy the duties requirement for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent; performing on the air radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator. 29 C.F.R. § 541.302(d).

The creative professional requirement generally is not met by a person who is employed as a copyist, as an animator of motion-picture cartoons, or as a retoucher of photographs. 29 C.F.R. § 541.302(c). Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. *See* 29 C.F.R. § 541.302(d).

The Fair Labor Standards Act (FLSA)

10.24 FLSA – COMPUTER EMPLOYEE EXEMPTION

Your verdict must be for defendant [on plaintiff's FLSA claim][1] if all of the following elements have been proved:

First, plaintiff was compensated on [(a salary basis[2] as defined in Instruction No. ___[3] at a rate not less than $455[4, 5] per week[6]) or (at a rate not less than $27.63 per hour)];[7] and

Second, plaintiff was employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field; and

Third, plaintiff's principal, main, major or most important duty consisted of at least one of the following:

A. The application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications;

B. The design, development, documentation, analysis, creation, testing, modification of computer systems or programs, including prototypes, based on and related to use or system design specifications;

C. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

D. A combination of the aforementioned duties, the performance of which requires the same level of skills.

Notes on Use

1. Insert the bracketed language if more than one claim is submitted to the jury.

2. Compensation may also be on a fee basis. If the case involves a fee basis issue, this instruction should be modified accordingly. *See* 29 C.F.R. § 541.605.

3. Insert the number of the "salary basis" instruction.

4. The $455 per week may be translated into equivalent amounts for periods longer than one week. The requirement is met if plaintiff is compensated biweekly on a salary basis of $910, semimonthly on a salary basis of $985.83, or monthly on a salary basis of $1,971.66. The shortest period of payment that meets the compensation requirement is one week. 29 C.F.R. § 541.600(b).

5. Or $380 per week, if employed in American Samoa by employers other than the Federal Government.

6. Exclusive of board, lodging or other facilities. *See* 29 C.F.R. § 541.606(b).

7. Select the bracketed language that corresponds to plaintiff's compensation.

The Fair Labor Standards Act (FLSA)

10.30 FLSA – SALARY BASIS

An employee is paid on a "salary basis" if the employee is regularly paid, on a weekly or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, and the amount is not subject to reduction because of variations in the quality or quantity of the work performed.[1] [An employee is paid on a salary basis even if the employee's salary is subject to reduction for one or more of the following reasons: (insert permissible deduction(s) at issue)].[2]

Notes on Use

1. 29 C.F.R. § 541.602(a).
2. Permissible deductions from an employee's salary include:
   - A. Deductions when an employee is absent from work for one or more full days for personal reasons other than sickness or disability. 29 C.F.R. § 541.602(b)(1).
   - B. Deductions for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation or loss of salary occasioned by sickness or disability. Deductions for full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted their leave allowance. Similarly, an employer may make a deduction from pay for absences of one or more full days if salary replacement benefits are provided under a state disability insurance law or under a state workers' compensation law. 29 C.F.R. § 541.602(b)(2).
   - C. While the employer may not make deductions for an employee's absence occasioned by jury duty, attendance as a witness or temporary military leave, the employer may offset any amounts received by the employee as jury fees, witness fees or military pay for a particular week against the salary for that particular week without loss of the exemption. 29 C.F.R. § 541.602(b)(3).
   - D. Deductions for penalties imposed in good faith for infractions of safety rules relating to the prevention of serious danger in the workplace or to other employees. 29 C.F.R. § 541.602(b)(4).

E. Deductions for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules pursuant to a written policy applicable to all employees. 29 C.F.R. § 541.602(b)(5).

F. In the initial and final week of employment, the employer may pay a proportionate part of an employee's salary for the time actually worked. 29 C.F.R. § 541.602(b)(6).

G. When an employee takes an unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked. 29 C.F.R. § 541.602(b)(7).

The Fair Labor Standards Act (FLSA)

10.40 FLSA – DAMAGES

If you find in favor of plaintiff under Instruction No. ___ [and you find against defendant under Instruction No. __],[1] you must award plaintiff damages in the amount that plaintiff should have been paid in [minimum wages and/or overtime compensation], less what defendant actually paid plaintiff.

[The minimum wage amount that should have been paid is the number of hours worked in each workweek up to 40 hours, times the minimum wage applicable to that workweek, as set forth in Instruction No. __.][2]

[The overtime compensation amount that should have been paid is the number of hours worked in excess of 40 hours in each workweek, times the regular rate for that workweek, times one and one-half, as set forth in Instruction No. __.][3]

You must calculate this amount [these amounts] separately [for each plaintiff] for each workweek.

In determining the amount of damages, you may not include or add to the damages any sum for the purpose of punishing defendant.

Notes on Use

1. Insert the bracketed language if defendant has asserted an exemption defense.

2. Insert the bracketed language if the plaintiff claims damages for a minimum wage violation.

3. Insert the bracketed language if the plaintiff claims damages for an overtime pay violation.

The Fair Labor Standards Act (FLSA)

10.41 FLSA – DAMAGES (ONLY HOURS WORKED SUBMITTED TO JURY)[1]

If you find in favor of plaintiff under Instruction No. ___ [and you find against defendant under Instruction No. __],[2] you must determine the number of hours worked in each workweek.

Notes on Use

1. Use this instruction only where the parties have agreed or the court determines that the jury will be asked to decide the number of hours worked, but will not be asked to calculate damages. Such an instruction may be appropriate where, for example, the appropriate rate of pay is not in dispute and damages may be calculated as a matter of law once the number of hours worked is determined by the jury.

2. Insert the bracketed language if defendant has asserted an exemption defense.

The Fair Labor Standards Act (FLSA)

10.42 FLSA – WILLFUL VIOLATION

If you find in favor of plaintiff under Instruction No. ___ [and you find against defendant under Instruction No. __],[1] you must determine whether defendant's failure to pay [minimum wage and/or overtime] was willful. Defendant's failure to pay [minimum wage and/or overtime] was willful if it has been proved that defendant knew that its conduct was prohibited by the [federal][2] law regarding [minimum wage and/or overtime pay], or showed reckless disregard for whether its conduct was prohibited by the [federal] law regarding [minimum wage and/or overtime pay].

Notes on Use

1. Select minimum wage and/or overtime as appropriate for the claim.

2. Insert the bracketed language only if there is potential risk of confusion to the jurors due to evidence or argument regarding state law.

The Fair Labor Standards Act (FLSA)

10.43 FLSA - GENERAL VERDICT FORM

VERDICT

Note: Complete the following paragraph by writing in the name required by your verdict.

1. On the [(minimum wage) or (overtime)][1] claim of plaintiff [_____][2] against defendant [_____],[3] we find in favor of:

_____

(Plaintiff _____) or (Defendant _____)

Note: Answer Question 2 only if the above finding is in favor of plaintiff [_____][2]. If the above finding is in favor of defendant [_____],[3] have your foreperson sign and date the form because you have completed your deliberations on this claim.

[2. Has it been proved that the defendant either knew its conduct was prohibited by the Fair Labor Standards Act or showed reckless disregard for whether its conduct was prohibited by the Fair Labor Standards Act?

_____ Yes _____ No

Note: If you answered yes to Question 2, you should award damages for the period from [____ to _____].[5] If you answered no to Question 2, you should award damages for the period from [____ to _____].[6]][7]

3. We find that the plaintiff should be awarded damages in the amount of:

$_____ (stating the amount)

_____

Foreperson

Dated: _____

The Fair Labor Standards Act (FLSA)

Notes on Use

1. This phrase should be used when the plaintiff submits multiple claims to the jury.

2. Insert the name of the plaintiff.

3. Insert the name of the defendant.

4. Model Instruction ___ (Burden of Proof) tells the jury that something is proved only if the jury finds it is more likely true than not true. The phrase "greater weight of the evidence" is not necessary here. It can be included in Instruction 3.04 if desired by the court.

5. Insert the date on which the plaintiff's cause of action accrued, or the date three years prior to the date on which the plaintiff filed his or her complaint, whichever is later. Insert the date the instructions are submitted to the jury as the final date.

6. Insert the date on which the plaintiff's cause of action accrued, or the date two years prior to the date on which the plaintiff filed his or her complaint, whichever is later. Insert the date the instructions are submitted to the jury as the final date.

7. This question is used when the parties dispute the "willfulness" of the defendant's actions. When the parties do not dispute "willfulness," Question 2 may be eliminated. Question 3 should become Question 2 with the following recommended language:

> For the period from _____ to _____, we find that the plaintiff should be awarded damages in the amount of:
>
> $_____.(stating the amount)

The Fair Labor Standards Act (FLSA)

10.44 FLSA - SPECIAL INTERROGATORIES (DAMAGES)

Your verdict in this case will be determined by your answers to the following questions. Make sure that you read the questions and notes carefully because they explain the order in which the questions should be answered and which questions may be skipped.

[Question No. 1: Was plaintiff employed by defendant on or after _____?

Yes ____ No ____
(Mark an "X" in the appropriate space)]

[Question No. 2: In plaintiff's work for defendant, was plaintiff [engaged in commerce or in the production of goods for commerce] [employed by an enterprise engaged in commerce or the production of goods for commerce that had annual gross sales of at least $500,000]?

Yes ____ No ____
(Mark an "X" in the appropriate space)]

Question No. 3: Did defendant fail to pay plaintiff minimum wage [and/or overtime pay] for all hours worked by plaintiff?

Yes ____ No ____
(Mark an "X" in the appropriate space)

Note: If you answered "No" to *any* of the above questions, you should have your foreperson sign and date this form and turn it in because you have completed your deliberations on this claim. If you answered "Yes" to all of the above questions, please proceed to Question No. 4.

[Question No. 4: Do you find for defendant under Instruction No. ___? [Exemption]

Yes ____ No ____
(Mark an "X" in the appropriate space)

The Fair Labor Standards Act (FLSA)

Note: If you answered "Yes" to Question No. 4, you should have your foreperson sign and date this form because you have completed your deliberations on this claim. If you answered "No" to Question No. 4, please proceed to Question No. 5.]

Question No. 5: For each workweek on the attached table, state plaintiff's hours worked, as that term is defined in Instruction No. ___.

_____
(Number of hours worked)

Question No. 6: For each workweek on the attached table, state the amount that plaintiff should have been paid in minimum wage, as set forth in Instruction No. _____.

_____
(State the amount)

Question No. 7: For each workweek on the attached table, state the amount that plaintiff should have been paid in overtime compensation, as set forth in Instruction No. _____.

_____
(State the amount)

Question No. 8: For each workweek in the attached table, state the amount of wages that you find plaintiff was actually paid by defendant.

_____
(State the amount)

Question No. 9: For each of the periods set forth below, state the amount of plaintiff's damages as that term is defined in Instruction No. _____:

$_____ for the period [date three years prior to filing suit] to [day before date two years prior to filing suit]

$_____ [date two years prior to filing suit] to the date of your verdict.

The Fair Labor Standards Act (FLSA)

Question No. 10: Do you find that defendant's failure to pay [minimum wage and/or overtime] was willful as defined in Instruction No. ___?

Yes ____ No ____
(Mark an "X" in the appropriate space)

_____
Foreperson

Date: _____

The Fair Labor Standards Act (FLSA)

Workweek Beginning Date	Workweek Ending Date	Hours Worked	Minimum Wage That Should Have been Paid	Overtime CompensationThat Should Have Been Paid	Wages Actually Paid

The Fair Labor Standards Act (FLSA)

10.45 FLSA - SPECIAL INTERROGATORIES (HOURS WORKED)

Your verdict in this case will be determined by your answers to the following questions. Make sure that you read the questions and notes carefully because they explain the order in which the questions should be answered and which questions may be skipped.

Question No. 1: Was plaintiff employed by defendant on or after _____?

Yes ____ No ____
(Mark an "X" in the appropriate space)

Question No. 2: In plaintiff's work for defendant, was plaintiff [engaged in commerce or in the production of goods for commerce] [employed by an enterprise engaged in commerce or the production of goods for commerce that had annual gross sales of at least $500,000]?

Yes ____ No ____
(Mark an "X" in the appropriate space)

Question No. 3: Did defendant fail to pay plaintiff minimum wage [and/or overtime pay] for all hours worked by plaintiff?

Yes ____ No ____
(Mark an "X" in the appropriate space)

Note: If you answered "No" to *any* of the above questions, you should have your foreperson sign and date this form because you have completed your deliberations on this claim. If you answered "Yes" to *each* of the above questions, please proceed to Question No. 4.

Question No. 4: Do you find for defendant under Instruction No. ___? [Exemption]

Yes ____ No ____
(Mark an "X" in the appropriate space)

Note: If you answered "Yes" to Question No. 4, you should have your foreperson sign and date this form because you have completed your deliberations on this claim. If you answered "No" to Question No. 4, please proceed to Question No. 5.

The Fair Labor Standards Act (FLSA)

Question No. 5: For each workweek on the attached table, state plaintiff's hours worked, as that term is defined in Instruction No. ___.

Question No. 6: Do you find that defendant's failure to pay [minimum wage and/or overtime] was willful as defined in Instruction No. ___?

Yes ____ No ____
(Mark an "X" in the appropriate space)

_____
Foreperson

Date: _____

The Fair Labor Standards Act (FLSA)

Workweek Beginning Date	Workweek Ending Date	Hours Worked